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LEGAL THOUGHT IN GREECE AND ROME[1]

A STUDENT comparing Greek and Roman literature, or Greek and Roman art, may easily be dazzled by the greatness and originality of the Greek creations, by contrast to Roman works which were largely produced under Greek influence and fashioned after Greek models. In order to correct his first vague impression, he will then proceed to discover in Roman works their specific Roman features and independent values. The reverse is true of the student of Greek and Roman law. In the field of law, the Roman achievement looms so large that we have to take some trouble to do justice to the accomplishments of the Greeks and to appreciate their contribution to the legal civilisation of the Western world.

Several factors are responsible for the preponderance of the Roman legacy. Roman law has been transmitting its message to Europe since the eleventh century through the medium of Justinian's grandiose legislative work, which makes available to us an enormous amount of legal lore. The *Corpus Juris* was compiled in late antiquity, but thanks to its peculiar structure, it gives detailed evidence on 600 years of Roman legal history. For the *Corpus* is not a code like those we have today in Continental Europe, but rather an anthology of huge proportions, made up of selections from the writings of about 40 jurists, beginning with late republican times, and from imperial legislation, beginning with Hadrian. Let us suppose for a moment that we did not possess the *Corpus*, nor the textbook of *Civil Law* written by Gaius around the year A.D. 150 and a few minor source books: we should then be dependent for our information on Roman law on the writings of non-jurists such as Cicero and other orators, the antiquarians and historians, the poets and, lastly, on the inscriptions. Supposing it were so: what should we really know of Roman law, its substance, its characteristics, and its significance? Very little indeed.

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[1] Lecture delivered at Stanford University in 1949 and at the University of Aberdeen in 1952. The author feels greatly indebted to Professor H. Fränkel, Stanford, for the English version of the German manuscript. A few references have been added.

Now that is precisely what our situation is like with respect to Greek law. There is no trace of any technical treatises on Greek law. The only authors that deal with legal matters *ex professo* are the Attic orators and the philosophers, Plato and Aristotle. There are further some stray bits of information to be gleaned from various literary sources, and there are the inscriptions and papyri, among them those containing the city laws of Gortyn in Crete and of Alexandria in Egypt. This body of evidence yields no comprehensive, detailed information on Greek law—and moreover, there never was a uniform all-Greek law. We possess a relatively rich material only for the laws of Athens, and for the late phase of development of Greek law in Ptolemean and Roman Egypt. Nevertheless we may safely assume that the various legal systems of Greece were at least similar in type and in their basic concepts, and that in the fourth and third centuries a measure of uniformity began to develop, at least in the field of mercantile law; for the convenience of interstate commerce the rules of contract had to be approximately the same in all the trade centres. Thus we may be able to discern, with some reservations, certain characteristics of Greek legal thought, and on this basis to inquire into the reasons why the legal systems in Greece and in Rome were as unlike one another as we shall find them to have been.

The feature of Roman law which since the Middle Ages has been admired most of all is the clear precision with which cases were construed. And yet we find that many of the guiding concepts were never explicitly defined by the

Romans, or when they were, the definitions often prove to be neither exhaustive nor otherwise felicitous. That clarity of which we spoke results rather from the aggregate of concrete case decisions. When we analyse the decisions, we see that they are guided by definite concepts and rules inherent in the legal tradition. As the great historian Savigny [2] put it, " Roman jurists looked on the concepts and norms of their science not as arbitrary creations but as real entities with whose existence and genealogy they had familiarised themselves through a protracted, close intercourse. This is why all their operational methods possess a positive assurance comparable to that of mathematical operations." Modern scholars engaged in the fascinating task of retracing, in the mass of case material, the guiding lines and of laying open the underlying concepts. When this was done, there came to light a consistent system of such a precision and definiteness that German jurists of the nineteenth century, one millennium and a half after Justinian, were convinced that the Roman system of legal concepts was the only possible one.

I shall illustrate this point of definiteness and precision by a few examples. The decisions of Roman jurists were all based on a strict distinction between absolute and relative rights. The prototype of absolute right is ownership, which was seen as an unrestricted legal power over an object and was protected against any one who would dispute that power. A relative right, on the other hand, a claim or obligation, is a relationship between two persons, involving the duty of the one to perform something for the benefit of the other. The principle that claim and obligation concern the two original parties exclusively was stubbornly upheld in the face of the many inconveniences to which it led in practice. There was no such thing as a claim transferred to a third party, or obligation taken over by a third party ; in order to effect a change of this sort, the obligation had to be annulled first, and then entered upon again by the new parties to it. Obligations were classified according to the mode of origin and the nature of the liability, and special principles were applied in dealing with each class; some of these norms were not really derived from the nature of the contract, but nevertheless it was taken for granted that all of them had to be complied with with equal consistency.

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[2] *Cf.* C. F. v. Savigny, *Vom Berufe unserer Zeit f. Gesetzgebung u. Rechtswissenschaft.* 3rd ed., 1840, p. 29.

Now let us turn to Greek law. The distinction between the right to use, and dispose of, an object and a rightful claim to an object is to be found here too, because it is obviously one thing to hold and handle a thing and another thing to be entitled to demand it. But the Greeks did not draw the line with rigid strictness. There are in Greece, just as in Germanic laws, borderline constructions, for instance in matters pertaining to real estate, constructions which combine features of ownership with features of claim. For Greek legal concepts were not neatly circumscribed; each of them had around its solid core a nebulous zone of possible, but not necessary, applicability. Thus there are to be found occasional blends of purchase and lease, of lease and loan secured by bond or mortgage, of loan and prepaid purchase of land. Of course, the ingenuity of notaries had something to do with such hybrids; but the hybrids would never have been admissible if Greek legal practice had been based, as Roman practice was, on a clear definite order of concepts. The Greeks, although they did possess the several notions of sale, rent, lease and loan, made no point of rigorously keeping them separate from each other. As for ownership, the Greeks did not even have a term for it. The concept of ownership is more abstract than the others just mentioned, because ownership does not originate from some special transaction between two definite parties but is rather of a somewhat negative nature: it shields one man's freedom of action from possible interference by others. Because of the abstract nature of ownership, the Roman terms for it, *dominium* and *proprietas*, did not emerge before the late Republic. But by then there were Latin terms for the body of rights implied in the fact of ownership, while the Greeks never got beyond a word κτῆμα which describes a particular object as owned by a particular person; never, that is, until Roman law was imposed on the Eastern half of the Empire, and Byzantine jurists coined the term κυριότης, modelled on the Latin term *proprietas*. Other terms likewise were lacking because the concepts had not taken firm shape. Most significant, the comprehensive concept of a "right" as such, in the sense of the right to do, to prevent, or to claim certain things (Latin *ius*) was non-existent as well as the concept of "law" (in Latin equally *ius*).[3]

The lack in Greece of an elaborate system of legal notions is not an unusual phenomenon, historically speaking; medieval Germanic law, for instance, offers many analogies. What is uncommon and unique is rather the Roman precision, which was due to the existence of a highly developed legal science. The Greeks produced no special science of law. Nevertheless we should do them an injustice if we styled their law primitive. Classical and Hellenistic Greece produced a business law fully adequate to their rather advanced trade practices. In the shape of maritime laws, the Greeks created a legal vehicle for capital investments corresponding roughly to sleeping partnership as we know it, and in a measure also to maritime insurance. Furthermore, the Greeks were used to making payments through the mediation of a banker; if the payee happened to have an account with the same banker, the procedure amounted to payment by cheque. Another interesting innovation was the development of the constitutive document, that is a document which, by virtue of its existence alone, automatically entailed the obligation to pay the sum named in it. It was an IOU in the guise of acknowledgment of a loan received, but it made no difference for the law whether or not such a loan had actually been made; the legal fiction of a loan to be repaid could just as well cover, for instance, the promise of a gift, or of a dowry, or a monetary commitment made in a stipulation of any sort. The document was in itself valid evidence for the obligation, with no questions asked as to the genesis of the commitment, and thus it represented an obligation in the abstract—a rather handy device which simplified matters greatly. One of its progressive features was that it was in writing. In the Hellenistic period, and perhaps even earlier, business transactions were largely made in written form. A number of Greek communities employed notaries public as early as the fourth century B.C. Transactions and rights regarding land were officially recorded, for the purpose, we are told, of publicity, that is, of protecting rights over land from actions by unqualified parties. In Ptolemean Egypt, special rules were in force for official documentation of sales of land or slaves. In Roman times, this system was further perfected, and a central register was set up where all transactions regarding land were recorded and kept on file.

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[3] Instead of "law" they spoke of "νόμοι" (see below, p. 10); *cf.* K. Latte, *Der Rechtsgedanke im archaischen Griechentum*, Antike u. Abendland II (Hamburg, 1946), 65.

Nothing comparable ever existed in Rome. The reason is that Roman law, with its conservatism,[4] doggedly stuck to primitive norms, among them the principle of oral procedure, for business transactions. Traditional Roman law prescribed for the sale of land, slaves or basic livestock (horses and cattle) an archaic rite. In the presence of five witnesses and of a man carrying a balance, the purchaser put his hand upon the object and declared, in a set formula, that the object was his; then he struck a piece of copper on the balance and handed the copper to the seller as a symbol of payment. The rite goes back to the time before coined money was introduced, as is shown by the use of raw copper and of the balance. The witnesses were originally identical with the neighbours who took note of the sale and would be able to testify to it in court. This then was a primitive form of publicity; it was adequate for tiny rural communities, but had outlived its usefulness when Rome was a huge metropolis. Nevertheless the

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[4] *Cf.* F. Schulz, *Principles of Roman Law* (Oxford, 1936), pp. 95 ff.

Romans religiously continued to use the rite down to late imperial times. In addition, they made a record in writing of what had been transacted, and other important business acts were likewise recorded. The technique of documentation was evidently borrowed from the Greeks; and yet the Romans were very far from also adopting from the Greeks the function of the record as a legal document. While Greek law based the obligation on the mere existence of the instrument, the Romans, under the rule of oral procedure, treated the record only as subsidiary evidence. If it could be proven in court that the procedure as described in the record had not taken place, or that the loan to which the document referred had never been received, the document meant nothing legally.

The stubborn traditionalism of Roman law had advantages as well as disadvantages. A legal system that readily lends itself to every ephemeral need cannot develop, as it were, a solid backbone. Roman jurists, faced by the same invariable set of principles, were obliged earnestly to ponder the nature and bearing of those principles. Thus, for instance, the theory of legal transactions in general was elaborated much more definitely in Rome than in Greece. After a long search it was eventually established that any legal obligation, whether entered upon formally or informally, is based on the consent of the parties. The statement seems a truism, and yet it was a fundamental discovery—a discovery to which the Greeks never progressed. Greek law never considered mere consent as legally binding, while the Romans already did this, for certain types of contract, in the third or second century B.C. The most important example is sale. It was one of the major feats of Roman law to construe sale as the mere consent as to goods and price, from which consent an obligation arises for the seller to deliver and for the purchaser to pay. The Greek law of sale[5] rests on a different ground and is far less perfect. It originated from cash-and-carry transactions, which are everywhere the starting point for rules of sale. In primitive cash-and-carry sales, consent, delivery and payment are simultaneous for all practical purposes, and there is no occasion for any obligation to come into being; such a sale is not a contract in the Roman sense, but only the legal cause for acquisition. Greek law never advanced beyond that view, not even when trade became more complex and a sale intended to be consummated at a later time was a frequent occurrence. A mere agreement to sell and to buy had no legal force. Whenever it was desired to postpone payment and still somehow to bind the bargain, the Greeks took recourse to the device of the arles or earnest, which is a partial prepayment. If the purchaser changed his mind, the earnest was forfeited; if the seller failed to deliver the goods, he had to refund the earnest and to add the same amount of his own money. It is clear that the consent of the parties has no relevance here; it is only the earnest that counts; and even with the earnest given and received both parties retain the right to withdraw at will, subject to a limited financial sacrifice. The Roman construction of consensual sale, on the other hand, is much more simple and plausible. Once the parties have promised to deliver and to pay, they are as honest business men bound to live up to their undertakings; their good faith is at stake, according to Roman views. And "whatever good faith requires a person to pay or to do" can now be claimed from him in the courts, says Roman law.

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[5] The fundamental work on this subject is F. Pringsheim's *The Greek Law of Sale* (Weimar, 1950).

The Romans, with all their rigorous traditionalism, with all the devious and sometimes bizarre techniques in which their early jurisprudence indulged, yet had the knack of solving fundamental problems in a surprisingly simple, straightforward, and efficient way.

We have so far compared Greek with Roman law by going into the substance of legal rules and legal notions on both sides. I should now like to say a few words about the sociology of law—or, more precisely, about the light in which Roman society, and Greek society, saw the body of laws they used, and what the consequences of these views were for the interpretation of old laws and the making of new ones.

From whatever angle we contrast Greek law with Roman law, the chief difference is always that the Greeks did not, and the Romans did, produce a great legal system. How are we to account for this inferiority in the field of law on the part of that nation which was superior to the Romans in intellectual pursuits generally? If it is true that the unique achievements of Greek civilisation were due to the adventurous independence of the Greek mind, I should like to suggest that it was precisely that same quality, the spirit of unrestrained independence and of free thought, which prevented the rise of a Greek jurisprudence. The essence of Roman legal thought was conservatism.

Let us look into the origins of Roman jurisprudence. It gradually emerged from a different medium, the medium of religion. On problems of appropriate action and procedure expert opinion was dispensed by the pontifical college. Because of these beginnings, Roman jurisprudence was thought to be imbued with some magic power, such as the practices of Roman religion were supposed to possess. In fact, originally, the major concern of jurisprudence was sacred law, which was developed into a rational system of superstitions. When private law came to the fore, the legal tradition continued to inspire a kind of religious awe. This view is reflected in the social standing, not only of the early priestly jurists, but even so of the later free jurists down to the times of Sulla. They enjoyed a prestige which was unthinkable in the Greek world. For a long period of time the method of this jurisprudence was close interpretation of the letter of the law and the designing of formulae which strictly complied with the law, and yet were able to meet novel needs. Cicero, a man steeped in Greek rhetoric, speaks with contempt of such pedantic quibbling and hair-splitting.[6] But nevertheless this practice provided an excellent training, for legal precision and efficiency. Early Roman jurists were obliged to achieve much with the few traditional principles and procedural formulae at their disposal, and thus they imparted to their law an economy of means[7] which made it much easier for later generations to acquire a command of the fundamentals.

There was evidently no place for a similar jurisprudence to arise in the intellectual and social environment of Greek cities—say, Athens. It is true that there too there were authorities on sacred law, who probably also influenced the development of secular law, especially in such fields as the law of homicide.[8] It is also true that numerous features of Greek law give evidence of an original connection, or even identity of law and religion.[9] And yet Greek piety was less constraining and ritualistic than Roman piety to begin with and the emancipation of law from religion took place there at an early date. From the seventh century on, the Homeric epics were spread as far as the more remote regions of continental Greece, and wherever a higher civilisation began to emerge, it did so under the influence of Ionian enlightenment. In a world of awakening individualism the law would sever the bonds that tied it to religion. The concept of Themis, divine order, gave way to the notion of νόμοι, human conventions.[10] At first νόμοι, just as Themis had done, included custom as well as law, both of them validated by tradition. But tradition also lost its power in the social revolutions of the seventh and sixth centuries. In contrast to Rome, where for several centuries a small number of clans dominated political life, administered the laws, and began to work out jurisprudence, there was no such continuity in Athens or, for that matter, anywhere else in

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[6] Cic., pro Mur. c. 10–13.

[7] *Cf.* F. Schulz, *Principles of Roman Law* (Oxford, 1936), pp. 68 ff.

[8] *Cf.* R. Maschke, *Die Willenslehre im griechischen Recht* (Berlin, 1926), p. 21 sq., B. Daube, *Zu den Rechtsproblemen in Aischylos' Agamemnon* (Zurich und Leipzig, 1938), pp. 151 ff.

[9] *Cf.* K. Latte, *Heiliges Recht* (Tübingen, 1920).

[10] *Cf.* R. Maschke, *l.c.*, p. 31 sq., K. Latte, *Der Rechtsgedanke im archaischen Griechentum* (v. *supra*, n. 3), p. 65, 71 sq.

Greece. One might think of Sparta; but it is obvious that in that totalitarian community there was no room for the development of law and jurisprudence.

The social crises at the end of the archaic period led in many parts of the Greek world to codifications of law, more or less complete. These codes were now primarily styled νόμοι, which was not yet an entirely rational term because it still carried the connotation of embodying some superior wisdom. And yet the νόμοι were man-made, and made for political purposes. They were designed to serve as the framework for a reconstructed body politic. The concept of State and Law as purely rational creations is a characteristic Greek innovation, and was probably connected with, or at least promoted by, the colonising activities of the period. Rome too sent out colonies, but their constitutions were exact duplicates of the constitution of Rome; not even the Italians who in the Social War rebelled against Rome were able to do anything but copy the Roman order of things. And as to Rome itself, the republican order, in spite of changes in detail, remained down to imperial times an immutable and hallowed entity, like the order of private law. No Roman, not even Augustus, ever conceived the idea of designing a State system upon definite principles rationally arrived at, as Plato and Aristotle did, and as in fact already Solon and Cleisthenes had done.

In Plato's and Aristotle's draft constitutions private law has also a place, as being one of the elements of the political system. Isolation of private law from public law, as in the Roman system, always remained foreign to Greek thought. On the other hand, the Greeks were far more familiar than the Romans with what is now called political jurisprudence. Accordingly, Greek inquiries were not aimed at the law—the law was for them no more than a means to an end—but at the underlying problems of ethics and political science; while the Roman devoted the entire power of his thought to the interpretation and application of the set body of positive law, which for him was the ultimate authority. We shall briefly return to this point later.

We have seen how in Greece the term νόμοι came to refer to a legal idea methodically arrived at by a legislator. But this was not the last step in the descent of law to the level of merely human institutions and expedients. That mythical aura of a special wisdom and inspiration which had surrounded the codifications by early arbitrators in periods of political strife (αἰσυμνῆται)—that aura vanished when the decrees of the popular assembly began to have equal validity with the ancient νόμοι and were likewise styled νόμοι. It may be permissible to argue, with some reservations, that the Greek development culminated in identifying the legal order with the arbitrary decisions of the masses assembled in the market place or, in the Hellenistic kingdoms, with the arbitrary decrees of the monarch. In Rome, just as in Greece, the law was secularised at an early date; but the legal order, since it remained tied to tradition, kept its ancient quality of hallowed immutability. In fact, even rules of private law that were enacted by plebiscite were in a measure invested with that same quality, precisely because they too had become a part of that hallowed body of law. That is the reason why in Rome the interpretation of the law was considered a worthy pursuit for men of the highest social standing and personal distinction. In Athens on the other hand, when leading thinkers like Plato, Aristotle or Theophrastus engaged in collecting and studying the facts of positive law, they did so in order to select the true laws for the true State, and in their search they reached the conclusion that all existing positive laws fell short of perfection.

Nevertheless a community such as Athens at the height of its intellectual life might have produced some kind of science for an objective interpretation of the positive law, if only the Athenian courts of law had been capable of appreciating an objective clarification of complex legal matters. Here it was again the peculiarly Greek view of democracy which prevented a development on such lines, comparable to that which took place in Rome. In Rome, the praetor and arbitrator who collaborated in settling a case were outstanding men in political and business activities, and though, as a rule, neither of them was a legal expert, they could, and frequently would, consult legal authorities. In Athens, the official presiding at the court was not a man of prominence but a citizen selected by lot. Furthermore, the actual power of decision rested with a crowd of hundreds of heliasts who were likewise chosen by lot.[11] In such a court only demagogic devices were effective, and thus there arose not a legal science but a rhetoric, using the same methods as political oratory did. The technique of court pleading was admirably developed by the Greeks, but it aimed at success for the client rather than at a just and fair verdict. Legal rhetoric was concerned with the law only in so far as it provided arguments pro and con, and not concerned at all with the law as a system of norms. For the orators were hired pleaders, and not officers of the law.

Thus it was left to the Romans to introduce scientific thought to the province of law. Their religious and social conservatism, which kept them far behind the Greeks in other fields of civilization, opened up for them the road to jurisprudence. It was their rigid adherence to set principles and traditional institutions which forced them earnestly to examine the material as to its content and import. These pedantic methods which had been developed for sacred law were applied to secular law and further elaborated. In this manner arose, not at first a jurisprudence as we know it, but a formularistic technique of legal manipulation. That the Romans ever progressed beyond that stage, the stage of practical lawcraft, was due to the adoption, during the last two centuries B.C., of certain Greek views and methods.

Thus it was after all the Greek genius which inspired, if not produced, the science of jurisprudence. It is a fascinating spectacle to watch that creative transformation as the writings of Cicero reflect it. It was not so much Greek philosophical thought as it was Greek rhetoric which gave Roman legal thought the decisive impulse.[12] In Roman lawsuits, pleaders with Greek training would inflict unexpected defeats on Roman jurists by their superior dialectical proficiency. Under the shock of this experience, Roman jurists began to study the Greek arts of analysing and synthetising concepts, and to arrange legal subjects in the manner of rhetorical textbooks, that is, to derive special rules from certain basic concepts ; from which stage, it is true, it is still a far cry to our idea of a legal system. It was further due to the influence of Greek rhetoric that equity made up leeway by introducing certain general remedies, especially the action and defence on the ground of the opponent's dishonesty (*dolus malus*). Present-day practice in civil law still takes recourse to this Roman device, whenever positive law proves unsatisfactory. Greek influence also brought about a clearer understanding of the subjective element in human actions and of the element of unlawfulness.

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[11] *Cf.* E. Gerner, *Zeitschr. d. Sav. Stiftung*, Rom. Abt. 67 (1950), p. 43 sq.

But despite all these innovations there was no breaking away from the old Roman ways. The material for which new solutions were worked out remained the same ; the same kind of questions, typically Roman, were asked, for typically Roman purposes. Down to the middle of the second century A.D. the jurists held the same characteristic Roman views, even those jurists who were native Greeks from the eastern half of the Empire. Domitius Ulpianus, *praefectus praetorio* under Alexander Severus, coming from Tyros in Syria, felt, as probably did all his predecessors, that the interpretation of positive law was the only true philosophy, as distinct from the apparent philosophy of theoretical speculation : " We cultivate justice and profess the pursuit of what is good and fair, drawing the line between what is permitted and what is not, trying to improve people through fear of punishment as well as through encouragement by rewards, and adopting, unless I am mistaken, the true philosophy, not an ostensible one."

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[12] *Cf.* J. Stroux, *Röm. Rechtswissenschaft u. Rhetorik* (Potsdam, 1949); F. Schulz, *History of Roman Legal Science* (Oxford, 1946), p. 62 sq.

This attitude of Roman jurists made it possible for jurisprudence to remain sound and useful even under Greek influence, and not to succumb either to the subjectivism of rhetoric or to the speculations of philosophy. At the same time this attitude was responsible for the fact that the most grandiose achievements of the Greek genius in the field of law were only half-heartedly adopted or not adopted at all. I am referring to Greek ideas on the philosophy of law, especially those of Aristotle. Such ideas would hardly be considered by Roman jurists as pertinent to jurisprudence; Ulpian, for instance, is quite likely to have looked upon them as an ostensible rather than genuine philosophy, because their content was never incorporated in positive law, either by the Greeks or by the Romans.

I have in mind chiefly two features of Aristotelian ethics. One of them is the theory of culpability, which analyses the questions of causality, of violation of law, and of degrees of responsibility, and analyses them with a clarity and precision such as Roman jurisprudence never achieved, because the latter was tied to the body of traditional law with all its complexities and incongruities. It was not until the rise of modern penal theory that the Aristotelian level was reached again.

The second element is the theory of natural law as developed by Aristotle and Stoicism. Later Roman jurists do mention natural law but they take no real interest in the subject. The most they are able to do with it is to misuse it as a makeshift expedient in explaining certain things which actually have nothing to do with natural law but are of a strictly positive and genuinely Roman nature. It was their unshakable belief in the absolute authority of the traditional legal system, that belief which opened before them the path to their greatest achievements, which led them away from an understanding of the perennial problem, the clash between Law and Justice. It is one of the immortal feats of the Greeks to have recognised that problem in all its gravity and to have solved it according to their lights. It remained for the medieval Christian philosophy to take up again Aristotle's theory of natural law, and on that basis the age of enlightenment in its turn erected a new grandiose structure, trying to refashion the entire legal system on rational lines. For us today Aristotle's theory of natural law is likewise a live problem. Under the impact of our experiences with total war and totalitarian systems which cloak in perfect legality acts and procedures that revolt our sense of decency and morality, we have lost our naive confidence in positive law. And thus once more, like fourth-century Greeks, we are setting out on a search for some prototype of all and any law, which may serve as a standard for rebuilding human communities and a comity of nations.

WOLFGANG KUNKEL.

IS *CULPA* AMORAL?

Mr. W. A. Elliott's admirable comparative study, of Scottish " Reparation " and the English " Tort of Negligence " [1] brings to Scots lawyers a timely warning not to take English decisions at their face value. He emphasizes the truth vindicated so dramatically by the recent decision of the First Division in *Inland Revenue Commissioners* v. *Glasgow Police Athletic Association*,[2] that although the respective systems may use, at times, terms which are superficially common in meaning, as well as form, only the unwary would treat them as synonyms. Yet, in this writer's humble opinion, it is doubtful whether Mr. Elliott correctly represents the law of Scotland when he states : " In Scotland at any rate it seems clear that negligence is a new word for *culpa* and denotes that branch of law dealing with breaches of legal duty to take care. These duties spring from a general conception of moral wrongdoing that finds its expression in the standards of the reasonable man." [3] It is submitted, (a) that if *culpa* be the foundation on which rests the edifice of Scottish reparation,[4] it cannot be equiparated with negligence ; and (b) that to relate reparation to morality, no matter which term of art is used, leads not only to a misunderstanding of the function of a law of reparation, *viz.*, the reasonable adjustment of the economic risk of which men living in society run the hazard, but also to the frustration, and eventual paralysis, of this important part of modern law. It is believed that one species of the law of reparation, *viz.*, nuisance cannot be reconciled with the claims which Mr. Elliott makes.

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[1] " Reparation and the English Tort of Negligence," *Juridical Review*, vol. lxiv, 1.

[2] 1952 S.C. 102, 1952 S.L.T. 136. But see 1953 S.L.T. 105 (H.L.).

[3] *Loc. cit.*, p. 10.

[4] Here restricted to meaning " unintentional wrongdoing."

It cannot be denied that as far back as *Campbell* v. *Kennedy*[5] the Second Division was using the phrase "*culpa* or negligence," and that dicta abound where these words are used interchangeably; nevertheless, it is suggested that Lord Atkin in *Donoghue* v. *Stevenson* correctly described negligence as a species of *culpa*.[6] In Scots law, at least, *culpa* is the legal concept and negligence a non-technical description of its most recurrent phenomenon; that is, negligence describes the manner in which *culpa* is most frequently incurred. But the very frequency of this phenomenon has brought about a shift in emphasis, almost amounting to a change in meaning, and the word "negligence" has become more and more identified with that type of action of which *Donoghue* v. *Stevenson* is the most dramatic example, namely, where the pursuer must aver and prove a duty to take care owed him by the defender, the defender's breach of that duty, and harm suffered by the pursuer of which the breach is the proximate cause. Thence it is but a step, which is often taken, to say that the source of the defender's obligation to repair is his negligence. Thus "negligence" may have several meanings. It may mean, in a broad sense, carelessness signifying a mode of conduct in which, so it is alleged, occurred a culpable act; or, it may mean a particular type of action in which the crucial issue is—was there legal negligence as distinct from conventional carelessness? or, it may mean the legal concept circumscribing the law of reparation, that is, *culpa*. The danger which may arise from this last use is that reparation may deteriorate into a Scottish tort of negligence. And why should there be any danger in that? There are many answers to that question, but the answer which is here relevant is—because it leads directly to Mr. Elliott's conclusion that *culpa* is the legal expression of "a general conception of moral wrongdoing." This in turn, it is submitted, tends to stultify the development of reparation and to obscure the true function of a law of reparation.

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[5] (1864) 3 M. 121.

[6] 1932 S.C.(H.L.) 31 at p. 44, 1932 S.L.T. 317

Inadequate, and, of course, misunderstood, terminology has had a great deal to do with an unwillingness to accept a truth, demonstrated a long time ago by the late Holmes J., that the real purpose of a law of reparation is the reasonable adjustment of economic risk.[7] Failure to grasp this truth has led to many barren controversies, unnecessarily subtle distinctions,[8] and such indefensible decisions as *Cameron* v. *Young*.[9] Possibly the most notorious of these controversies rages over the question—to what extent, if any, is the decision in *Rylands* v. *Fletcher*[10] acceptable to Scots law? There is a school of thought which refuses to countenance that decision, and which shelters behind that sacrosanct principle, " no liability without fault." It is a matter for conjecture whether the shelter which that principle gives is not more apparent than real, and for the reason that " fault " is a woefully ambiguous translation of *culpa*. The use of the word " wrong," to denote the source of the defender's obligation to make reparation, has also had an evil influence. The connotation of " wrong " is invariably a canon of morality of which it denotes a breach. History, too, has played its part. " Obediential " in the mouth of Stair had a distinct moral flavour, for it described an obligation commanded by natural law. No doubt it was possible and natural for both Stair and Erskine to say that a wrongful act, a quasi-delict, was reprehensible because, in the last resort, it offended against the law of God. Today " obediential " is a most useful adjective which, properly used, enables reparation to be a creative part of Scots law, but no one would claim that it has a theological connotation.

It is considered that there are at least two formidable objections to the morality theory. First of all it puts the emphasis on " wrong," which is commonly defined as the infringement of a legal right. Such an approach tends to have a narrowing effect similar to that of the traditional English formula that the right depends on the remedy, because it suggests that unless the facts can be fitted into a nominate category of wrong there is no legal right. It leads to such a decision as *Bradford* v. *Pickles*.[11] In its more modern guise it takes the form of *Dumbreck* v. *Addie*,[12] *London Graving Dock Co. Ltd.* v. *Horton*,[13] and *Christmas* v. *General Cleaning Contractors Ltd.*[14] In the second place it tends to limit the scope of *culpa* by identifying it, at worst, with legal negligence, at best, with conventional negligence or carelessness. It is submitted that it is neither: that *culpa* is much more comprehensive, capable of containing at one end legal negligence of the most technical nature and at the other end what, to the uninformed, appears to be strict or absolute liability. In brief *damnum plus culpa* does not mean that in Scots law of reparation there is no liability without legal negligence, or there is no liability without fault: it does mean that there is no liability without legal fault and legal fault there may be even where the most censorious could find not even carelessness.

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[7] *Cf.* " The Common Law " p. 144.

[8] *e.g.*, between *locatio operis* and *locatio operarum*.

[9] 1908 S.C.(H.L.) 7, 15 S.L.T. 976.

[10] (1868) L.R. 3 E. & I.App. 330.

The view here advocated, a view urged much more persuasively by the late Holmes J.,[15] is that the law of reparation is today concerned with harms, not wrongs. Whatever may have been the circumstances of the seventeenth and eighteenth centuries, they have gone for ever. The nineteenth century introduced a great change which is still under way. The use of machinery in almost all forms of human activity, particularly in the employment of labour and the means of transport, has had many important consequences. Two of these are that the risk of personal harm followed by severe economic distress is infinitely greater. The emphasis which the community stresses is the harmfulness of the activity, not its wrongfulness. Nor does the law always lag behind. Can it be denied that the majority in *Donoghue* v. *Stevenson* and the Judicial Committee in

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[11] [1895] A.C. 587.

[12] 1929 S.C.(H.L.) 51, 1929 S.L.T. 242.

[13] [1951] A.C. 737.

[14] [1952] 1 K.B. 141, recently affirmed by the House of Lords.

[15] *Op. cit.*, *loc. cit.*

Grant v. *Australian Knitting Mills*[16] were considerably influenced by the fact that modern methods of mass production of consumer goods create conditions in which harm can be done to persons, remote in time and space from the harmful act? The question is not whether the defender has committed a wrong, but whether his act has caused harm to the pursuer in such circumstances as entitle the latter to reparation. In this sense morality does play a part, but a part essentially different from that indicated by Mr. Elliott. According to Mr. Elliott the decisive question is —" Did the defender do wrong?" whereas, the better view, it is submitted, is—" Has the pursuer suffered a harm, and, if so, should he be granted a remedy? " The answer will vary with time and place, but, allowing for that variation, the answer given, an answer dictated by non-legal factors, is—" Yes, if the defender could have avoided causing the harm." But avoidance may mean not merely of the mode in which the harm-causing activity is carried on, but also abstention from the activity itself.

It is conceded that the interpretation contended for by the writer does not get rid of all the sophistries which encrust the law of reparation, but, it is suggested, it does afford a better insight of the workings of such a law. For example, consciously applied it makes intelligible decisions such as *Morrison* v. *Ritchie*,[17] *Outram* v. *Reid*,[18] *Hulton* v. *Jones*,[19] whereas in each the liability of the defender turns upon a wholly fictitious malice. Yet no one could seriously argue that these defenders had acted wrongfully. It is not enough to say that these cases represent intentional " wrongs." The criticism is that if the morality theory correctly represents the law, then, to preserve the consistency of that theory the law must resort to meaningless and unnecessary distinctions. But, possibly more destructive of the validity of the morality theory is the place which nuisance occupies in the law of reparation. Unlike slander it has no fictitious "intention" attributed to it.[20]

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[16] [1936] A.C. 85.
[17] (1902) 4 F. 645, 9 S.L.T. 476.
[18] (1852) 14 D. 577.
[19] [1910] A.C. 20.

According to Bell, "the description of nuisance in Scotland is the same whether the public or the individual be regarded. Whatever obstructs the public means of commerce and intercourse whether in highways or navigable rivers; whatever is noxious or unsafe, or renders life uncomfortable to the public generally, or to the neighbourhood; whatever is intolerably offensive to individuals in their dwelling-houses, or inconsistent with the comfort of life, whether by stench (as the boiling of whale blubber), by noise (as a smithy in an upper floor), or by indecency (as a brothel next door), is a nuisance."[21] And this should be compared with the statements appearing in the latest edition of Gloag and Henderson that the term nuisance is "commonly used to denote the infringement of a natural right of property," and, "the most common instances of nuisance are those referred to in the latter part of Bell's definition, which consist in the disturbance of an owner of property in his use and enjoyment thereof."[22] The latter are much more restrictive than the former; nevertheless, the better view seems to be, as the wide sweep of Bell's definition indicates, that nuisance is not restricted to describing a misuse of property by its owner or occupier resulting in the disturbance of an owner or occupier of other property in his use and enjoyment thereof, but extends to the doing of any activity which in its consequences substantially disturbs the communal equilibrium. The balance upon which the life of the community is poised is maintained by a necessary observance of restraint by the individual. Lack of restraint may create a nuisance.

"Nuisances are never the creation of nature, but of mankind,"[23] and the law of nuisance is a *species* of the *genus* the law of neighbourhood.[24] Its genesis is in the not infrequent phenomenon that an activity lawful *per se* may, according to circumstances of time and place, be unlawful *sub modo* because the result of the activity is to cause substantial harm to the person or property of others, or to interfere substantially with "the comfort of life," or to violate in a manner deemed prejudicial to the social well-being the prevailing norms of behaviour. There is conflict between the rule that if a man exercises an undoubted legal right, or liberty, in a manner intrinsically lawful, he is not liable to repair the damage which may be occasioned to another, and the rule *sic utere tuo ut alienum*[25] *non laedas.* The law effects a compromise and permits a certain margin —*lex non favet delicatorum votis*— but will not be too slow to restrain an activity, however lawful in itself, which causes material annoyance and discomfort for the ordinary purposes of life. Thus it is only relatively true to say that "no action lies for the reasonable use of a lawful trade, in a convenient and proper place, even though someone may suffer inconvenience from its being so carried on"; but it is absolutely true to say, "where a man, by an act on his own land, such as burning bricks, causes so much annoyance to another in the enjoyment of a neighbouring tenement as to amount, prima facie, to a cause of action, it is no answer that the act was done in a proper and convenient spot, and was a reasonable use of the land. The fitness of the locality does not prevent the carrying on of an offensive though lawful trade from being an actionable nuisance; but whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance, an action will lie, whatever the locality may be."[26]

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[20] Glegg (3rd ed.) classifies it under "unintentional wrongdoing."

[21] Principles s. 974.

[22] *Introduction to the Law of Scotland* (6th ed.) at p. 489.

[23] *Per* Lord President Clyde in *Morrison* v. *L.M.S. Rly.*, 1929 S.C. 1 at p. 5, 1928 S.L.T. 647.

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[24] "Neighbourhood" is not restricted to the relationship arising out of the use and occupation of heritage.

[25] "*Alienum*" should not be translated too literally.

[26] *Cf. Bamford* v. *Turnley*, 31 L.J.Q.B. 286, cited by the Lord Chancellor (Selborne) in *Shotts Iron Co.* v. *Inglis* (1882) 9 R.(H.L.) 78 at p. 79, where "The pursuer conceded that he must establish a substantial injury. The defenders admitted that if he did so he was in law entitled to the remedy which he sought." *Per* the Lord Ordinary (Rutherfurd Clark) (1881) 8 R. 1006 at 1010.

Nuisance nearly always raises the most difficult of all questions, the question of degree, the problem of the balancing of legitimate but conflicting interests. In a general way it may be described as lying between two *termini*: the one in which inconvenience, annoyance, and harm to third parties is an inescapable consequence of the doing of a lawful activity, but there is no nuisance because the benefits outweigh the disadvantages; [27] and the other where an operation is carried out " which involves great risk to the safety of life and property, (and) the condition on which alone that can be allowed which causes such risk is complete protection." [28] Nevertheless it seems almost impossible to fit nuisance into a clearly delimited logical category. This would not matter were the approach to all quasi-delictal problems by way of the question—" Has the pursuer suffered an unjustifiable harm? " The legal habit of mind shies away from such a general question, and demands a precise specification of the right alleged to have been infringed. The decision in *Bradford* v. *Pickles* [29] is intelligible when set against the contemporary political background; technically it is distinguishable on the ground that the plaintiffs could not justify their claim as arising out of the infringement of a right vested in them. The concept of duty which is the *sine qua non* of legal negligence illustrates the strength of this tendency to look for a right whose infringement will justify imposing on the defender an obligation to make reparation. The emphasis on " right " demands a series of categories in Scots law as well as English law, and the opinions of the minority in *Donoghue* v. *Stevenson* demonstrate how too slavish an adherence to a formula may darken rather than illuminate.

Laurent v. *Lord Advocate* [30] is a case in point. Professor

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[27] *Vide* the opinion of Lord President Inglis in *Laurent* v. *Lord Advocate* (1869) 7 M. 607.

[28] *Per* Lord Justice-Clerk Hope in *Kerr* v. *Earl of Orkney*, (1857) 20 D. 298, at p. 302: *Caledonian Railway Co.* v. *Greenock Corporation*, 1917 S.C.(H.L.) 56, 1917, 2 S.L.T. 67.

[29] [1895] A.C. 587.

[30] (1869) 7 M. 607.

Dewar Gibb in his *Select Cases in the Law of Scotland*[31] selects this case for the proposition—" When a man carries on lawful and natural operations on his own property with due skill and care he is not liable for damage done to others by the operations "—and, most certainly, the extract from Lord President Inglis' judgment justifies it. It is a matter of considerable doubt, however, whether the reasoning of the Lord President convincingly disposes of the problems which the case raises, and which are adverted to by Lord Kinloch in an extremely instructive opinion. Had the pursuer's counsel argued the case on nuisance it is not improbable that the Lord President's reasoning would be completely lacking in conviction.[32] Perhaps the result would have been the same, but not necessarily for the reasons given by the Lord President. At least an argument based on nuisance would have had this advantage, it would have demonstrated that the proposition of Professor Dewar Gibb, save in a particular context, is far too general and imprecise. Unfortunately, counsel pitched his argument too high by seeking to maintain —" When an individual, even by a lawful act upon his own property causes damage to his neighbour, he is responsible for the consequences, even although the act is not ' wrongful,' either in itself or in the sense of being done negligently or unskilfully. Apart from *culpa* arising through negligence or unskilfulness, any invasion of the property of another is wrongful, according to the maxim *sic utere tuo ut alienum non laedas*."

The complex nature of the problem is illustrated by cases which prima facie are the converse of *Laurent*, namely, cases where the standard of care demanded is so high that nothing short of not doing the act is an adequate precaution. In England such cases can be referred to the doctrine of *Rylands* v. *Fletcher*.[33] Whether that doctrine, with its subsequent refinements,[34] forms part of Scots law is here irrelevant; the fact remains that there are Scottish analogues, for example, *Kerr* v. *Earl of Orkney*,[35] and *Caledonian Railway Co.* v. *Greenock Corporation.*[36] In *Kerr*, the Earl of Orkney constructed at his own hand and for his own purposes, a pond and embankment on the stream on which Kerr's mill was situated, at a point about half a mile above the mill. Some months later heavy rainfall caused a flood which destroyed the embankment, and the stream, immeasurably increased by the waters of the pond, swept away Kerr's house and mill. He sued for damages. The defender answered—" The outbreak of water was not caused by the fault of the respondent, who is therefore not liable for the consequences." The Second Division repelled this plea: " I think it is right to state the general principle on which the view of the court is founded. That principle is—that if a person chooses upon a stream to make a great operation for collecting and damming up the water for whatever purpose, he is bound, as the necessary condition of such an operation, to accomplish his object in such a way as to protect all persons lower down the stream from all danger. It is not sufficient that he took all pains which were thought at the time necessary and sufficient. . . . When an operation is made which involves great risk to the safety of life and property, the condition on which alone that can be allowed which causes such risk is complete protection." [37] These observations appear almost identical with those of Lord Gifford in *Caledonian Railway Co.* v. *Baird & Co.* [38] In that case the defenders had erected a village, for the accommodation of miners in their employment, on the banks of a stream which was suitable and was in use for drinking and domestic purposes. Drains from the village discharged into the stream and polluted it. The inferior heritor brought an action of interdict which was successful. Lord Gifford observed: " I cannot go along with the argument so ably maintained by Mr. Balfour that in the case of ordinary dwelling houses erected bona fide in the usual way and *sine animo injuriandi*, the evil is practically inevitable and therefore that the upper proprietor has a right to cause it. I think he has no right to cause it. If he cannot erect a village without polluting this stream, and, it may be, depriving his neighbours of their only supply of pure water, then he can let the village alone. He is under no obligation to build a village any more than to build a manufactory. I do not see that he has any right to interfere with the property of another man by building a village for his own behoof. No doubt he may use his own property for any lawful purpose; but the rule is he must so use it as not to injure his neighbour." [39]

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[31] 2nd edition, at p. 136.

[32] *Vide* footnote by Professor Dewar Gibb, *op. cit.*, *loc. cit.*

[33] (1868) L.R. 3 E. & I.App. 330.

[34] *e.g.*, *Read* v. *Lyons* [1947] A.C. 156.

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[35] (1857) 20 D. 298.

[36] 1917 S.C.(H.L.) 56; 1917, 2 S.L.T. 67.

[37] *Per* Lord Justice-Clerk Hope at p. 302

[38] (1876) 3 R. 839.

What difference in principle is there between these two cases? The latter clearly falls under Bell's description of nuisance, the former not so readily, although it can be described as a case of nuisance if the definition favoured by Gloag and Henderson is chosen as a criterion, namely, that is a nuisance which consists "in the disturbance of an owner of property in his use and enjoyment thereof." [40] Nor should it be forgotten that in one of the leading cases on nuisance, *Inglis* v. *Shotts Iron Co.*, [41] the pursuer in argument relied on *Kerr*.

It is arguable that the distinction depends on the remedy.[42] This would belie the boast of Scots law that the remedy depends on the right, and not the right on the remedy. It would indeed be a strange distinction which classified a case as one of nuisance when the remedy sought was interdict and as something else when the remedy sought was damages. Principle and practice concur in denying that interdict is the special badge of nuisance: it may be the appropriate remedy in the majority of cases but it is neither universal nor exclusive.[43] Nor is the question of distinction academic. It is a question which raises sharply the vital question—Is there a universal principle lying at the back of reparation and, if so, what is that principle? For long enough Scots lawyers have been accustomed to proclaim, with a somewhat irritating complacency, that the basic principle is that there is no liability without fault. "If a person exercises an undoubted legal right, and damage is thereby caused to another, it is not to be taken for granted that he is responsible, but it is necessary that the party complaining should prove negligence or *culpa*."[44] Does nuisance come within the scope of this principle? If it does not, then the principle is not universal. It is submitted that nuisance may only be brought within the scope of the principle if the distinction between negligence and *culpa*, already adverted to, holds good—if it is true to say that "fault" is an ambiguous translation of *culpa*— for either it may be said that negligence is irrelevant to the question of nuisance[45] or it may be said that *culpa* must be proved and is proved where the circumstances show that the noxious activity complained of cannot be rendered innocent by any amount of care on the part of the alleged delinquent. The latter proposition is only meaningful if *culpa* and negligence are not synonyms. The point was raised in *Edinburgh Railway Access and Property Co.* v. *Ritchie*.[46]

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[39] At p. 848.

[40] *Op. cit.*, p. 489.

[41] (1881) 8 R. 1006.

[42] *Vide* the opinion of Lord Kinloch in *Laurent supra.*

[43] *Cf. Chalmers* v. *Dixon*, (1876) 3 R. 461.

In that case the defenders were carrying on building operations in the course of which there was much blasting and consequent damage to the adjacent property of the pursuers. The Lord Ordinary (Low) approved of the following issue,—"Whether the operations of the defenders . . . . damaged the heritable subjects belonging to the pursuers . . . to the loss, injury and damage of the pursuers." The defenders reclaimed and argued, that as they could not be liable without fault, fault must therefore be in the issue. The Second Division upheld this argument. "In whichever way the case is looked at the question is one of fault . . . that the issue must be based upon fault on the part of the defenders I have no doubt."[47] The real interest of the case lies, however, in what was said by Lord Low in justification of his approval of the issue. "The question whether operations in themselves lawful, conducted by a proprietor within his own property, which result in injury to his neighbour's property, render him liable in damages unless there has been fault or negligence on his part is one upon which there has been considerable difference of opinion. The general rule I take to be, that there must be fault or delinquency, but in this case I do not think that the question arises, or at all events is of importance. If the necessary or natural result of the blasting was to cause structural damage to the pursuer's property, although there was no want of care and skill in the conduct of the operations, then the defenders were not, in my judgment, entitled to carry on the operations at all, because no man is entitled to cause an explosion in his property, the necessary or natural result of which is to blow down or injure his neighbour's house. On the other hand if injury to the pursuer's buildings was not a necessary or natural result of the blasting, but injury in fact resulted, the inference is that the operation was negligently or unskilfully conducted."[48]

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[44] *Mackintosh* v. *Mackintosh* (1864) 2 M. 1357 *per* Lord President Inglis.

[45] Glegg, *op. cit.* p. 319; *Slater* v. *McLellan*, 1924 S.C. 854, *per* Lord President Clyde at p. 859, 1924 S.L.T. 634: "negligence" here has the meaning which Mr. Elliott gives it.

[46] (1903) 5 F. 299, 10 S.L.T. 522.

Is this reasoning really inconsistent with the essential requirement of fault or delinquency? It is thought not. Every negligent activity which results in relevant damage may be said to have that damage as a necessary or natural result. The actor is said to be negligent where the circumstances are such that he ought reasonably to have foreseen that the consequences of his activity will be harm to another. May not the proposition be stated this way, that the actor is negligent where the circumstances are such that harm to another is the necessary or natural result of his activity? In short the only difference is verbal. Nor is it a difference in kind that the only care which will avoid the causing of harm is to refrain from doing the activity. On this reasoning what Lord Low was saying was this: that if you proceed with an activity the necessary or natural result of which is [49] injury to your neighbour, it is no answer to say that you took all possible care. This proposition and nothing less gives and can only give meaning to the principle of no liability without fault. The premise common to all quasi-delictal problems is that the activity which caused the damage is *per se* a lawful activity. In itself it does not incur a legal sanction, whether by way of damages, interdict or otherwise. Lemonade may be manufactured as carelessly as the manufacturer may in his discretion think fit, if at the end of the day it is to be poured into a sewer. The modern development of " negligence " has filled the books with illustrations, for example, running-down cases, of activities which may be carried on without causing harm to a third party, where there is a clear margin of " avoidability." The consequent tendency is to think that if there is no such margin then there cannot be fault, and therefore, liability. Nuisance is merely one type of activity which demonstrates that this is not so. The proposition that an activity lawful *per se* may be in certain circumstances so potentially harmful that no care short of not carrying on the activity will suffice is, it is submitted, perfectly consistent with the principle of no liability without fault. In the ordinary running down case no dilemma arises. On the one hand no one would assert that X should suffer bodily harm rather than that Y should not drive a car; on the other hand Y may nearly always drive a car with no substantial risk of harm to X. Care on the part of Y enables him to drive the car and, at the same time, avoid harming X. In nuisance the dilemma is often a real one. A may set up a soap factory in the depressed area of B, thereby giving employment to many local inhabitants. The effluvia from the factory may cause a nuisance to C, whose house is adjacent to the factory. The nuisance cannot be avoided if the factory continues to operate. Has the factory to close down, or must C go elsewhere? With whom does the balance of convenience lie? In such circumstances, while it may be easy to assert that if D keeps a man-eating tiger in his back garden, and the tiger escapes and mauls E, it is no answer for D to aver and prove that he took all possible care to ensure that the tiger did not escape, it is not so easy to say the same about a nuisance which is unavoidable, but which is a necessary part of an activity which is of great benefit to the community. In seeking to escape from this difficulty there is an understandable tendency to shelter behind a supposedly rigid rule that *culpa* is irrelevant to the law of nuisance. The tragedy of such a tendency is that it robs the law of one of its most important functions, namely, the adjusting of competing interests, the satisfying of conflicting wants. Some interests and some wants are incompatible, and a choice must be made, but the choice should be made intelligently and not as a consequence of the pronouncement of an incantation. Intelligent choice means that *culpa* is not a phrase, but a notion, whose application is an inescapable part of the social process. Those who administer the law are the filter through which percolate into the legal system those political principles which animate human communities, and without which a system of law cannot live. On the efficiency of the filter depends the virility of the legal system.

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[47] *Per* Lord Justice-Clerk Macdonald at p. 302.

[48] At p. 302.

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[49] Or " which you are bound to foresee will cause."

A satisfactory and intelligible law of nuisance demands an intelligent application of the doctrine of *culpa*. A rigid formula, rigidly applied, is worse than inadequate, for it stultifies the law and lays it open to ridicule. The cry that " intelligent application " will lead to a wilderness of uncertainty is the refuge of the intellectually indolent. Certainty is an admirable quality, but a slavish adherence to it inevitably produces stupidity, which is not. The greatest evil which uninspired Austinian jurisprudence[50] has inflicted on Scots law is the belief that a legal system is somewhat akin to Euclidean geometry, complete and self-sufficient, a gigantic exercise in abstraction. The truth is otherwise. The life of the law is uncertainty, the climate in which it flourishes is competitive, and its task may be interpreted as a never-ending series of compromise and reconciliation. Law is neither abstract nor ornamental, but concrete and dynamic. The problems of nuisance, as with all other human problems, require that it should be so. The solution to these problems does not lie in the search for logical *differentia*, but in analysis of the *species facti* of the individual cases. Lord Young's observations in *Edinburgh Railway Access & Property Co.* v. *Ritchie* go near the mark : " All that it involves is a trial of the facts whether the specified damage to the pursuer's property was occasioned by the defender's operations on their property adjoining ; and if occasioned by those operations, whether the operations were such as the defenders were entitled to execute, having regard to the position of their property, and having that regard for their neighbour's rights which every proprietor in such a situation is bound to have ; and whether the operations were carried out in such a way as the defenders were entitled to adopt. If the damage . . . was caused by those operations but the operations were such as the defenders were entitled to carry out in the way in which they were carried out, there would be an end of the case." [51] The conclusion embodied in the last sentence must be reached not by the invocation of a phrase, but by effort of the intelligence. The lawyer ought to and must disdain the gibberish of the witch-doctor, rather is he something of a social surgeon dedicated to the skilful use of scalpel and needle.

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[50] *The Sources and Literature of Scots Law*: Stair Society: Volume I at pp. 443, 444.

The principle lying at the back of nuisance, and kindred parts of the law, seems to be this : that although a man is entitled to exercise an undoubted legal right, its exercise is conditioned by circumstances of time and place ; that is, its exercise must be reasonable. What is reasonable will vary ; *tempora mutantur, nos et mutamur in illis*, is directly applicable. Reasonableness here is not synonymous with the

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[51] (1903) 5 F. 299 at pp. 302–303.

"reasonableness" of negligence. It is much more extensive, and comprehends a consideration of the harm which has been caused or is likely to be caused. "In short, there is here a conflict between the two principles—first, that a person is entitled to use his property[52] for any lawful purpose, even although such use should be injurious to his neighbour, and without being liable in damages; and second, this other principle, that a person must so use his property,[53] as not to injure his neighbour's property.[54] The mode of reconciling or applying these two principles may be delicate, and there are often cases in which it is very difficult to draw the line . . . the distinction between the two classes of cases lies in the kind of use which a person makes of his own property[55]."[56] That use may be a nuisance as in *Inglis* v. *Shotts Iron Co.*,[57] or may with equal facility bear two or more interpretations.[58] In a broad sense that use is a nuisance where the harmful consequences of which complaint is made flow from an activity which is *vis-à-vis* the complainer substantially continuous or frequently recurrent. But this is a rule of thumb rather than a definition, with limitations which the decision in *Slater* v. *McLellan* makes manifest.

The case of *Chalmers* v. *Dixon* is an instructive introduction to the problems which this article seeks to raise. There the defenders had for many years been engaged in calcining iron-stone at their pits in Fauldhouse. In the course of these operations they had, as was the universal practice, deposited the waste material of their pits in bings. One of these bings caught fire, and the pursuer, who was the tenant of a neighbouring farm, alleged that the noxious smoke and vapours given out by the burning bing were a cause of discomfort and ill-health to himself and his family, and of serious injury to his crops. He brought an action for interdict and damages. The conclusion for interdict was not insisted in, but the Lord Ordinary (Craighill) found the allegations proved and awarded damages. The defenders reclaimed, and argued—" The erection of the bing in question was not only a perfectly lawful use of the defenders' premises, but it was an ordinary and necessary part of the conduct of their trade. There was no allegation and no proof that they had neglected any precautions. The occurrence of the fire was shown to be an unforeseen event for which the defenders could not be made liable, except upon the theory that a man carrying on a lawful operation within his own premises was bound to insure his neighbours against any incidental injury, a theory which had no place in the law of Scotland." This argument presented the Second Division with a problem which perhaps all of the judges did not convincingly solve. It is an attractive argument which if Mr. Elliott's propositions were true would prove irresistible. But, it is submitted, it goes too far. Its major fallacy is a confusion of *culpa* with negligence or fault.

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[52] Or, more generally, "to exercise a legal right."
[53] Or, more generally, "so to exercise his right."
[54] Or, more generally, "harm his neighbour."
[55] Or, more generally, "his right."
[56] *Per* Lord Gifford in *Chalmers* v. *Dixon*, *supra*, at p. 467.
[57] *Supra.*
[58] *Cf. Chalmers* v. *Dixon*, *supra.*

Unfortunately there are so many attractive trees in this particular wood that the path through it may easily be lost. The cryptic remarks of Lord President Clyde in *Slater* v. *McLellan*, namely, " It is not necessary for him in order to establish his right to damages to appeal to the doctrine of *Rylands* v. *Fletcher*, nor indeed to the law of negligence. His remedy is under the law of nuisance," [59] seem to do little more than assume as self-evident what requires explanation and understanding. The concluding remarks of the Lord Ordinary (Patrick) in *Western Silver Fox Ranch* v. *Ross, etc., County Council* [60] are more to the point—" But the true answer to the defenders' case under this branch of the law is that, having due regard to their duty to their neighbours and to the large amount of damage any other course was likely to cause, the reasonable thing for the County Council to do was to delay their blasting operations until the end of June, when the breeding season would have been past." As Lord Gifford ventured to suggest in *Chalmers*, the true distinction is the use one makes of a lawful right. Most decided cases have dealt with the use of property : hence, the tendency has been to think in terms of natural and non-natural use, or primary and secondary purposes. These terms, in their proper context, are no doubt helpful; but the true distinction is probably between the reasonable and unreasonable exercise of a right.

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[59] 1924 S.C. 854 at p. 859.

[60] 1940 S.C. 601 at p. 608; 1940 S.L.T. 144.

This distinction, it is suggested, seems to be the essence of the principle underlying reparation, the criterion for deciding whether there has been *culpa* and consequent liability. The activity, which is the occasion of the liability, is in the beginning and in itself lawful—to manufacture soap or lemonade, to drive a motor-car, to blast rock, to do or possess and enjoy the thousand and one things which make up the sum of human activity. But it must be done reasonably, not because it is wrongful if done unreasonably, but because it is or may be harmful. The words " right " and " wrong," hallowed as they are by long usage, cannot now be got rid of, but their use should not obscure the fact that a law of reparation concerns itself with harms, and in particular unjustifiable harms. When, then, is a harm unjustifiable? The answer is when the actor has made unreasonable use of his rights or liberty. This answer is not a solution but a signpost. Of course if a legal system is static or too oppressed by a rigid doctrine of precedent then the content of " reasonable " or " unreasonable " will not vary greatly, the reasonableness of 1908 will remain in law the reasonableness of 1953, although clean contrary to the political reasonableness of the later year. If the legal system is fluid the task of the lawyer will be more difficult, but its achievement infinitely more satisfactory.

In this setting the function of *culpa* becomes intelligible. It denotes the basis of legal liability incurred in consequence of the actor having caused unjustifiable harm to another. The harm is unjustifiable because it has proceeded from the unreasonable exercise of a lawful activity. In determining whether there is *culpa* the circumstances of each individual case will play an important part. The subjectivity of the actor may be relevant as, for example, in *Western Silver Fox Ranch Co.* v. *Ross, etc., County Council*, or it may not. The pseudo-objectivity of the hypothetical reasonable man and his fictitious foresight may be useful tools in the obtaining of a decision, but they will not operate either universally or infallibly. In a case of nuisance the search will be to ascertain on which side the balance of convenience lies. In a running down case that use of the highway will be unreasonable where the circumstances indicate that the harm complained of was the necessary or natural result of lack of care in the management of the vehicle. The hypothesis of the reasonable man and his foresight may be resorted to to determine proximity of causation, but not in order to create the sophisticated distinction which separates *Bourhill* v. *Young*[61] from *Muir* v. *Glasgow Corporation.*[62]

It would be idle for the writer to pretend that the arguments here advanced are foolproof or that they will meet with approbation. If, however, they provoke or help to provoke, a re-examination of our law of reparation, a thoroughly critical analysis of *culpa* and of the phrase " no liability without fault," and a dispassionate inquiry into the reasoning behind such decisions as *Rylands* v. *Fletcher*[63] and *Re Polemis*,[64] they may not have been made in vain.

J. J. Gow.

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[61] 1942 S.C.(H.L.) 78, 1943 S.L.T. 105.
[62] 1943 S.C.(H.L.) 3, 1944 S.L.T. 60.
[63] (1868) L.R. 3 E. & I.App. 330.
[64] [1921] 3 K.B. 560.

PROPERTY IN RELATION TO MARRIAGE AND THE FAMILY

especially in the Traditional Systems of the Isle of Man and the Channel Islands, as compared with that of Scotland

I. *Introductory*

THE people of Scotland, so far as they have studied the report of the Committee of Inquiry into the Law of Succession (1951), will undoubtedly have endorsed its unanimous recommendation that the legal rights to moveable property of wives, husbands, and children (*jus relictae,-i*, and *legitim*) should be maintained. Most of them will have also agreed with the recommendation that the claims of widow and widower to the heritable (or real) property of the dead spouse should be equalised, though there may well be difference of opinion, as there was among the expert witnesses whose evidence the Committee received, as to whether this should be done by assimilating courtesy to terce, or by extending to all property the present claims on moveable estate.

The example of Scotland in proposing the perpetuation of legal rights, with adjustment to remove the one point of difference between the claims of man and wife, may be of interest to those in other countries where rights of succession or the property rights of man and wife are under consideration. They will note that legal claims to take effect after the death of the spouse or parent are regarded in Scotland as entirely compatible with the separate property of married people, and that the Married Women's Property Acts did not here disturb or endanger *jus relictae* and *legitim* but on the contrary settled them more firmly (in 1881) by balancing the former by *jus relicti* and extending the latter to the estate of the mother in addition to that of the father.

Those who, being interested in the nature and origin of legal claims in Scotland, start their studies with Lord Fraser's famous argument[1] that the widow's part is not grounded in a conception of *communio bonorum*, will find that it clears up for those who accept it one clash of ideas only to present them with another. Lord Fraser, writing before the Married Women's Property (Scotland) Acts, argued that the power of the husband over the property contributed by the wife to their joint moveable estate was simply ownership, as evidenced by his ability to spend, waste, or dispose of the whole of it in any way other than by bequest, and that accordingly the use of the term *communio bonorum* was misleading and unreal. When however he came to consider the claim of the wife's heirs or next-of-kin to her third part if she died intestate before her husband and her right to bequeath it by will, which were still in force when he first wrote (nine years before both were abolished by section 6 of the Intestate Moveable Succession (Scotland) Act, 1855) he describes this as her share of the goods in community, and in fact the partial distribution which then took place on the wife's death if this occurred first clearly disproved the view that the husband's relation to the wife's part was one of simple ownership so long as he lived.

Lord Fraser conjectured that the term and the idea of community of goods had been brought to Scotland from France in the seventeenth century, but whether he thought the claim of the wife's heirs or legatees on her death before her husband only dated from then is not clear. He mentions that Balfour[2] declared that a wife could not make a will without her husband's leave, and notes that this is in contrast with later Scottish law, but says nothing about the antiquity of the claims of her heirs if she died intestate. If they did indeed receive a share of the goods in community before the seventeenth century, a matter on which there is evidence to be examined, the whole conception of community cannot have entered Scotland then as a complete novelty, though of course the term may have then been borrowed to describe an already existing reality.

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[1] *Personal and Domestic Relations*, 1846; *Husband and Wife*, 1876.

[2] *Practicks*—circa 1580.

On the other hand, the contention of some more recent scholars, from Pollock and Maitland onward, that a well-nigh absolute power of the husband over the joint estate, such as that under the Scottish *jus mariti* before the Married Women's Property Acts, does not clash with the idea of the community of goods, because he is head of the wife and therefore naturally administrates the joint estate, will not satisfy some modern students. It is true that wherever the idea of goods in community existed alongside the idea of dictatorial marital power, they had somehow to get along together, but it is not true that they did not clash, and here Lord Fraser was right. He believed and asserted that there had been a *communio bonorum*, worthy of the name because characterised by a power and responsibility shared by the two spouses, " a partnership proper in which the two associates had equal rights "[3] at one time among some European peoples, and that this had lent its name to systems which had no true claim to it. He quoted Article 389 of the Coutume of Normandy, as it was revised and written down in 1583, which explicitly denied that the goods of man and wife were in common. He claimed that this rejection had saved the Norman usage from an inherent contradiction in the usage of the other French Coutumes, which professed to accept common property without according a full measure of shared responsibility. The Scottish system of legal rights, like that characteristic of England in the Middle Ages, was, he believed, closely allied in its origin with the Coutume of Normandy. Accordingly it should in his view be accepted in Scotland as in Normandy (previous to the French Civil Code) that any true *communio bonorum* was necessarily excluded by *jus mariti*, and that *jus relictae* had an entirely different basis.

The systems of legal rights of spouses and children in the Channel Islands, which are largely similar to those in

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[3] Fraser, 1846, p. 326.

Scotland, are avowedly accepted as part of the Coutume of Normandy. A study of their nature and history may help to throw light on the nature and history of the Scottish system, and, conversely, it may be an advantage to approach their study from Scotland, where usages so like theirs are, as they are, very much alive at this day.

On the other hand, there was, equally near home, another traditional system which, up to 1777, showed what the *part of goods* of man and wife could mean, when it had come down from early times unaffected by Norman usage, and relatively little affected by such great influences as the Roman civil law and feudalism which helped to mould law and custom both in continental Europe and in Britain. The Isle of Man has, like the Channel Islands, its own jurisdiction, and long had its own law and custom coming down from early sources, though relatively little is still extant today. Unlike the usage of the Channel Islands, however, that of the Isle of Man, though it also may have come largely from a continental source, was not habitually ascribed thereto, being regarded as indigenous, and being preserved in virtual isolation from external influences, except of course for the universal influence of the Church.

Thus we can study the claim of spouses and children to property, moveable and immoveable, in the kindred systems of Scotland and the Channel Islands, with their resemblances and differences, and in the contrasting traditional system of the Isle of Man, which will here be considered first. Great as the contrast is, all alike accept marriage and the family as constituting a claim on property and as preventing the disposition of the whole by the last will of a single individual. England abandoned this doctrine and bestowed such power by a process beginning with desuetude and ending (in the late seventeenth and early eighteenth century) with statute, to return to it centuries later in modified form in the Inheritance (Family Provision) Act, of 1938, but Scotland, the Channel Islands and many other countries, both within the British Commonwealth, *e.g.*, South Africa and Quebec, and without, have preserved it to the present day.

It is not only as reflecting their own national history and individuality, and the continuity of their historic institutions, that denizens of all such countries should value the rights they accord to spouses and children. These claims, in forms which may vary according to local history and conditions, flow from doctrines of family responsibility and matrimonial solidarity and mutual rights which are worthy of full respect and attention. Whether or not the conception of the resources of man, wife, and children which underlies these claims can be properly regarded as *communio bonorum* in Scotland and the Channel Isles has here to be explored; that it had this character in the Isle of Man (though the term was not in use) has here to be demonstrated. In any case it clearly implies, in its origins and in the attitude it embodies, a status of the wife as a member of a union with rights enduring even after the death of her spouse, and not as the chattel she is sometimes said to be under English common law.

That, whether or not this last assertion was just during recent centuries up to the coming into force of the Married Women's Property Act, it had not always been so in England has also to be observed. The Inheritance (Family Provision) Act, 1938, was in a sense a recantation, an act of partial restoration of an abandoned principle.

The example had already been set by one of those Dominions which had formerly accepted from England a complete freedom of bequest; the New Zealand Family Protection Act of 1908 [3*] gives the court power to order that proper provision be made for wife, husband, or children out of an estate if a will has been left not doing so adequately. The English Act of thirty years later on similar lines was perhaps all that was feasible, after so long an absence of all restriction, but it represents a compromise between complete freedom of bequest and the claims of the family unnecessary and inappropriate to countries where the former has never been allowed to overwhelm the latter. As will be seen, the example of the then dominant individualistic English attitude led the Isle of Man to water down her system in 1777 and 1852, and it was finally dropped, still on the English example, in 1921, after which she followed England back in 1939 to her position of compromise in an Inheritance (Family Provision) Act. To those who study the Manx usages as they were before 1777, this may well seem a poor substitute for the Island's own striking traditional practices. As in England however, though not so long ago, the decline of the rights of spouse and children in the Isle of Man had been prolonged, and perhaps only a partial recovery was to be expected.

[3*] Preceded in New Zealand by an Act to Insure Provision for Testators' Families, 1900.

Some whittling away of traditional family rights was widespread in the individualistic climate of the early and mid-nineteenth century, combined, as it was, with a reinforced conception of the rights of the husband and father over property due to the emphasis of the time on his function as business entrepreneur. Such was effected even in Scotland by the Intestate Succession Act of 1855.

This removed the chief limitation (apart from the limitation of bequest) on *jus mariti*, which was however soon to be brought to an end by the Married Women's Property (Scotland) Acts of 1877 and 1881.

The measures to give married women secure ownership and control of their own earnings and all property separately contributed by them to the married regime, which were urgently necessary wherever a *jus mariti* had previously been accepted, and the more so the more unlimited it was or became, do not however give them a full partnership in the joint earnings of the couple, unless they have taken part in their acquisition *not only in fact but in name*; nor does it give them any claim to the savings therefrom, even if these are solely made by their economy and good management.

Some European countries and some states of the U.S.A., which keep separate the property brought by each spouse to marriage, regard husband and wife as " entitled to share equally in the gains and acquisitions of the partnership during its existence."[4] The number of American states following this practice has recently increased, apparently chiefly to allow the joint income of each couple, however contributed, to be divided between them for the purposes of assessing income tax. Some such system of modified *communio bonorum*, called in Europe *communio quaestuum*, would seem highly worthy of consideration by countries at present according wives no adequate share of income and savings therefrom.

In truth in most married partnerships a separation of goods can neither be complete nor entirely equitable, nor can it remove the need that when death takes one partner, the other and the children should have a claim on a share. And so in Scotland and in the Channel Islands legal rights were not abolished but rather adjusted where this was deemed necessary to bring them into closer harmony with the provisions of the Married Women's Property Acts. It is to be hoped that these countries will continue to treat the traditional Parts of Husband, Wife, and Children with careful respect, and that any other countries examining or adjusting their own laws of property and succession will do the same. They should of course be altered if and to the extent to which the citizens of these countries are convinced, after full examination and consideration of underlying principle, alteration is needed. They should not however be dropped as outmoded or through the example of a country such as England whose traditions in this sphere were broken centuries ago. It is the absence of all protection of the family from the unlimited power of testament that is outmoded. Any countries which like England had no such protection should like England restore it, even if only by a compromise; as has been observed, among British countries New Zealand set the example[5]; more recently several Canadian provinces have passed legislation on somewhat similar lines.[5*] But those who have preserved their own traditional systems should study their origins and history. They should also compare their record and present usages with each other for their mutual guidance and encouragement both to correct what is defective and to hold fast what is good.

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[4] *The New Community Property Jurisdictions*, William Q. de Funiak; *Tulane Law Review*, XXII, 1947.

[5] *Martindale-Hubbell Law Directory*: Part IV.

II. *The Isle of Man*

A.—General. That what is there called *widowright* existed in the Isle of Man up to recent years is incontestable and well known, and so is the fact that in some cases at least a husband could not there dispose of land by sale without the consent of his wife formally expressed. On the Island itself these points of the old Manx law appear to be more widely recognised by the general public than their, partly immediate and partly eventual, abolition in 1921. The Married Women's Property, Dower and Widowright Act, passed by Tynwald that year, brought the Manx law, substantially at once and almost exactly ultimately, into line with the English, not only positively by giving married women the control of their own property, but negatively by abolishing their historic rights, only to be followed in 1939, again on English example, by an Inheritance (Family Provision) Act partially restoring them. The negative action seems at first sight hard to explain, except by the example of English law, and perhaps also by the unawareness of many of the Manx people of what was happening. The Married Women's Property Act embodied a great and necessary reform, and the introduction along with this reform of a change which would bring to an end a valuable and distinguished aspect of Manx law was widely overlooked.

A study, however, of the changes made in 1777 and 1852, which preceded that of 1921, reveals a gradual abolition of the Manx law (and custom) with regard to the property and inheritance rights of man and wife in three steps or strides, the effect of the first two being to reduce the previous substantial equality between the sexes, each time to the disadvantage of the woman.

[5*] *Dependants Relief Legislation*, W. P. M. Kennedy; *Iowa Law Review*, XX, 1935.

The period before 1777, for which we have documentary evidence bearing directly upon the property and inheritance rights of husband and wife and of their children in the Isle of Man, begins about 1500, so that it extends over some two and three-quarter centuries. The documents, however, never purport to present anything new in this respect except very occasional minor amendments in existing law and custom. They all assume that the law or custom they state or imply has been " used and allowed of longtime heretofore " to quote one of the most important.

The greater part of the Isle of Man presents a clear example of the two-fold pattern of the division of moveable property between man and wife, as contrasted with the three-fold pattern of division between father, mother, and children, characteristic of mediaeval England and followed in Scotland and in the Channel Islands to the present day. Its conditions before 1777 display how equalitarian between the sexes such a division can be. Moreover, Manx customary law presents a parallel equality of claims of husbands and wives on each other's inherited land, and a similar division of this into halves on death, though giving in this case only an interest for life or rather *widowhood*, as compared with an absolute interest in moveables. Thus Manx records are specially worthy of study by those who today demand complete equality, and may too hastily assume that this involves complete separation of property and even the abandoning of inheritance claims.

Moreover, the equal rights of husbands and wives to make wills, and practice of doing so, usually on the deathbed, in the setting of the comprehensive and continuing function of the Church Courts, and their intimate contact with the lives of the people, make the records illuminating of social conditions and family life in the seventeenth and eighteenth centuries. Court records sometimes report deathbed conversations, presumably on the witness of the clergyman of the parish. Further, to accounts of distributions on death are sometimes appended notes of happenings years later, *e.g.*, the spending on a child's needs and planting out in life of "his mother's (or father's) child's part." Altogether we are presented with—not merely an account of formal proceedings but—a succession of peepholes into the procession of life and death and the relationships of man and wife, and of parent and child, so far as this can be expressed in the due sharing and passing on of this world's goods.

B.—The Racial, Historical, and Social Background. It seems well first to recall briefly the main racial constituents of the Manx people and their history and to examine such evidence as there is of their institutions. Until the beginning of the ninth century Man was an exceptionally undisturbed part of the Celtic world. She was visited by the Romans, but most scholars do not think there was any substantial Roman settlement. She was evangelised early, and traditionally ascribes her reception of Christianity to St. Patrick or his emissaries, though there is some likelihood that missionaries reached her shores earlier in the fifth century from South-west Scotland, as part of the campaign of St. Ninian and his immediate successors. She shared the Christian flowering of Celtic art and is especially rich in stone carving, mainly Christian, though Norsemen later carved their pagan stories alongside, and later again added their own Christian testimony on stone. By the Saxons she was left untouched.

The Norsemen arrived on Man as plunderers about A.D. 800, and became its rulers some time within the next two centuries. They seem to have settled down with the Celts on tolerably equal terms. There were many Celtic-Norse marriages on the Island, as in both Scotland and

Ireland. Though the Norsemen were heathen when they came, and churches and abbeys were raided for their loot and destroyed, Christianity was probably not entirely overwhelmed. The Norsemen do not seem to have been out to destroy ideas, or customs, but rather to let their people and those among whom they settled and their respective ways of life shake down together and find an equilibrium. By the eleventh century, the time of Godred Crovan (usually identified with the King Orry of legend), whose line for some 200 years reigned over Man and the Isles, and at first also over large parts of Ireland, the Norsemen had officially embraced Christianity, and being, as compared with the Celts, organisers by nature, seem to have welcomed the universal organisation and standards of the Church more readily than they did.

The *Chronica Regum Manniae et Insularum*, the work of monks at Rushen Abbey founded near Castletown on Man from Furness Abbey in 1134, tells the story of the Island from the eleventh to the early fourteenth century as it appeared to those who, though they were not quite contemporaries of the earlier episodes they record, were much more nearly so than any later commentator.

All the *local* information we have about the government of Man in Norse times is contained in :—

(1) The statements of Olave I, King of Man, that he granted to Furness Abbey land (for Rushen) and the right to elect the Bishop of Man, "*plebis consultu*" and "*sapientium consulio et bonorum assensu*," "on the decision of the people" and "with the advice of the wise, and the consent of the good."[6]

(2) The statement in the Chronicle that, on October 25, 1237, "*facta est . . . congregatio totius Mannensis populi apud Tinguālla*," "a meeting was held of all the people of Man at Tynwald."[7]

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[6] *Manx Society Publications*, 31 volumes issued 1858–1882 (cited here as M.S.), vol. vii., pp. 2 and 5.

[7] M.S. xxii 95.

(3) The word *Tynwald*, which, as the Norwegian authority, Professor P. A. Munch, tells us in his preface to the Chronicle, is " the old Norwegian denomination of Pingvollr (field of the Thing or Parliament) only slightly modified."[8]

That such assemblies were characteristic of Norse, and perhaps also of Celtic peoples, is accepted by most scholars, though it is only safe to define the *thing* as a *parliament* in the literal sense of a talking or discussion.

The first statement about early land tenure in the Isle of Man, and the only one in definite terms, appears in the Chronicle and runs as follows : " Godred then granted to the few islanders who had remained with him the southern part of the island, and to the surviving Manxmen the northern half, on condition that none of them should ever presume to claim any of the land by hereditary right. Hence it arises that up to the present day the whole island belongs to the king alone and that all the revenues are his."

This seems to imply that land had previously been held by hereditary right, and that the monks did not take for granted the feudal theory that all land belongs to the king, but considered a historical explanation necessary to account for its acceptance in Man.

This account has two other points of interest, the statement that some landholding Celts on the Island were accorded a continued status more or less parallel to that of the victorious invaders, and the division of the Island into North and South, the former being left in Celtic hands while the latter was given to the " Islanders," which is generally interpreted as meaning Norse settlers from the other islands on the West of Britain who had followed Godred's banner. Modern scholars consider however that if any such incident took place it was perhaps a century earlier than the late eleventh century, to which the monks ascribe it.

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[8] *Ibid.*, 31.

R. D. Farrant[9] calls attention to the prevalence among Norse peoples of allodial or *udal* land holding, without dependence on a lord. The Celtic tenure by a large family unit was also probably allodial in the sense that the services and dues in kind which were paid to chieftains and leaders were not regarded as an acknowledgment that the land (agriculturally considered) was theirs. This does not imply a golden age of human equality among either Celts or Norsemen, as has sometimes been hastily assumed. There were nobles and commoners, though it is believed that the latter did not hold their land from the former; there were also slaves who may have done a large share of the heavy work. But the social hierarchy was not a feudal hierarchy based on a landlord-and-tenant relationship. A man of the common people (the *plebs* according to the Latin of King Olave) certainly had "betters," but he did not have a "superior" (as the term is used in Scotland up to the present day) unless and until, through conquest, or through the infiltration of the feudal doctrine that all land ultimately belongs to the Crown, the conqueror or the king became his superior.

In Man and other Norse countries, the state of affairs which ultimately came into existence with the acceptance of this theory was not complicated and turned from a direct monarch-cum-landlord relation to his subject-cum-tenants by the existence of a system of land cultivation deriving from the Roman villa with its largely servile population, as it was in those parts of England and of Europe where the Roman occupation was intimate and prolonged enough to set up a social system. And in Man it was only complicated to a small extent by the creation of baronies and not at all by the creation of sub-baronies, and sub-sub-baronies, each holding from the one above, as went on so fast in England after the Norman Conquest until the process was stopped in 1290 by the Statute *Quia Emptores*.

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[9] *Manx Land Tenures*, 1906, and *Mann*, 1937. R. D. Farrant (Deemster, 1925–1947).

The only baronies on Man were all ecclesiastical, grants to monasteries, of which the largest was that to Rushen Abbey, and to the Bishop, and seem to have amounted in all to about a sixth of the agricultural land.[10] Of the Charter from King Magnus (1252–1265) to Bishop Richard we have the actual words, as it was ratified in 1329 in a Scottish period and again in 1423 by the second Sir John Stanley and quoted verbatim each time. This gives the Bishop and his successors power to " hold their court of life and limb in all cases of theft homicide and other wickednesses " and requires both clergy and laity (*tam clerici quam laici*) remaining on the bishop's land to plead and reply in his court, while at the same time it frees them from " all service, secular exaction and demand, forfeiture or fine." Presumably the right to these last are transferred from the Lord to the Bishop, though this is not definitely stated.[11]

Though fisheries, breweries, customs, anchorage, wharfage, and the mining of lead and iron if discovered are all mentioned, agriculture is not, so we learn nothing of its system, but we certainly get an impression, not of a population of semi-servile villeins, but of a laity comparable in social status to the clergy.

At the time of the cession of Man by Norway to Scotland in 1266, the king was clearly regarded in Norse territories, or some of them, as entitled to revenues and services as well as homage, and Man was handed over and the Orkney and Shetland Islands retained on precisely the same conditions in this respect, repeated word for word: " *cum dominiis, homagiis, redditibus, servitiis, et omnibus juribus et pertinentiis.*" Whether the revenues and services were by then definitely connected with landholding so that *redditus* here means rents rather than revenues in general, we cannot be sure. In the same document it is said of the inhabitants " that none may be punished or complain concerning their inheritances in these islands, but peaceably remain in the same."[12] Thus the claim that Manxmen had no rights of inheritance, if ever made, seems clearly to have lapsed.

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[10] M.S. xxxi, 268–9.
[11] M.S. ix, 13–8.

It seems possible that when in after years Manx lawyers, from Deemster Parr[13] onwards (following the 7th Earl of Derby who used the term *copyhold* apparently as equivalent to *customary*[14]) described Manx land tenure as more akin to copyhold than freehold, they were overlooking the fact that the term freehold in England, at the time of *Quia Emptores* and before, was used of land held from a feudal superior and bearing burdens of rent and service. The term seems to have meant that the tenure neither was nor had ever been servile and that the services were not arbitrary and did not provide the main labour on a demesne of the Lord's extensive enough to demand half or a third of the tenant's time. In that sense it seems highly probable that the population transferred from Norwegian to Scottish suzerainty were freeholders, had always been so, and continued to be so. Godred Crovan might be represented as having tried to take away their claim to hold by hereditary right, but, as will soon appear, it was taken for granted in Man that there had been freeholders "in King Orry's day."

Since the process of creating barons went so short a way, most occupiers of agricultural land held direct from the King (or Lord) of the Island and, except a few ecclesiastical barons, there was no feudal class intermediary between the Lord and the farmer. The rural interests of the Third Estate were represented in the Scottish Parliament by Barons, from whom most of the farmers held and who themselves for the most part held from the great noblemen, and in the English Parliament by Knights of the Shire, who in like manner were often tenants of the great lords and landlords of the farmers. In Man, however, as our documents will show, the representatives of the Third Estate were " 24 freeholders " from Norse times onwards.

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[12] M.S. ix, 211–2.

[13] *An Abstract of the Laws, Customs, and Ordinances of the Isle of Man* ("*Parr's Abstract*") compiled shortly before 1690, in MS. only, in Manx Museum.

[14] *Statute Books of the Isle of Man*, vol. i (called in some editions *Lex Scripta*) under date 1636.

There appears, in the fourteenth century, to have been a period of glut of land and shortage of tenants. It may be that this was responsible for the final step in the establishment in Man of primogeniture in land, as this is understood in England and Scotland. Though, in Norse tenure, first all sons and later all children had a claim, it appears to have become usual in Norse countries, judging both from the Orkney records and Norwegian law-books,[15] for the eldest son of a farmer to have the chief buildings and the land that immediately went with them, and satisfy his brothers and sisters with more outlying land, or, if there were not enough available, buy them out, sometimes by a share of the income. Such payments would, it may be conjectured, lapse if holdings with their liabilities ceased to attract a sufficient number of would-be tenants. That " straight " primogeniture developed from the buying out of co-heirs, followed by the lapsing of the payment for economic or other reasons, whether this happened early or late, seems more likely than that it was ever either deliberately introduced by the inhabitants or imposed by their rulers.

The Scottish Crown did not hold untroubled possession of Man. There was a Manx rebellion in 1275. In 1290, Edward I of England took the Island, the inhabitants having freely put themselves under his protection. Two or three years later he gave it to John Balliol, King of Scotland, whom he regarded as his vassal. Edward is however believed to have resumed possession of the Island in 1307 and to have held it until Robert Bruce in 1313 took Rushen Castle and gave Man to his nephew, Thomas Randolph, Earl of Moray. That, though his hold was not undisputed, Randolph kept possession, is evidenced by his having in 1329 formally renewed the Charter King Magnus had granted to the Bishop.[16] In 1334 however, Edward III announced that he had entrusted Man to William de Montacute, first Earl of Salisbury, and a few months later he gave up all rights to him. Within a few years we find the Earl of Salisbury, Lord of Man, buying off the Scots.[17] The second Earl of Salisbury succeeded, but sold Man in 1393 to William le Scrope.[18]

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[15] Both quoted in *The General Grievances and Oppression of the Isles of Orkney and Shetland* (" *Grievances* ") by James Mackenzie, written circa 1750, printed 1836.

[16] M.S. ix, 1317.

Finally the Island was granted in 1406 to Sir John Stanley and his heirs, to be held as a Fief of the English Crown.

Meanwhile the feudal manor was breaking up in England. That it was never introduced in Man is apparent from the absence of large agricultural demesnes. The Lord's demesne there seems never to have been more than a park, or, to use the Scottish term, policies, intended to give pleasure, space, and dignity, rather than agricultural produce. On the barony of Rushen Abbey, the demesne was estimated by Henry VIII's accountants as, in rentable value, nearly a quarter of the agricultural land,[19] but the monks were keen farmers as the Lord was not, and their demesne seems to have been altogether exceptional for the Island. Thus it seems evident that though Manx farmers gave service to the Lord they were not required to give regular agricultural labour in his fields, the Lord's revenue coming from rents and contributions in kind from the holdings of the tenants and not from the yield of lands in his own hands.

C.—The Ordinances Committed to Writing 1417–1430. The documents now to be considered, in which the representatives of the Island gave account of their laws, customs, and institutions to their new Lords in the early fifteenth century, are impressive in the picture they present of elaborate and detailed administrative and judicial arrangements, some of which at least are manifestly ancient, as witness the name of Tynwald, and the definition given of the Keys. They may be found in the Book of Statutes of The Isle of Man. The wording is very nearly identical in all editions, from those in manuscript of the seventeenth century preserved in the Rolls Office and the Manx Museum, to Volume I of the modern official publication edited by J. F. Gill, under the supervision of A. W. Adams and Sir James Gell, in 1883. Nevertheless, comparison with a somewhat different and apparently earlier version of the earliest ordinances in the Sloane MS. in the British Museum, published by the Manx Society in 1860, in its Volume III, edited by the Rev. William Mackenzie, suggests forcibly that the version in the Statute Book was adjusted, perhaps subconsciously, to fit its assertions into the post-Reformation scene. For instance, the Sloane MS., in describing the Tynwald Ceremony, speaks of " the 3 Reliques of Man . . . and three Clarkes bearing them in their surplesses." In the Statute Book, from the earliest edition onward, the clerks in their surplices remain with no apparent function; the relics have gone. In the Sloane MS. the " Prioresse of Duglas " does her fealty with the other Barons; the later scribe may have forgotten a woman could have such a status; he wrote " priors " and has been copied in all subsequent editions. There were undoubted copyist's errors in the earlier version, but, as Mr. Mackenzie points out, while these are such as might result from ignorance or carelessness, the text does not appear to have been altered " to suit the changes of the Reformation and of legal procedure " and that in the Statute Book does. Accordingly, the quotations in this chapter are from the Sloane MS., any important variations being given also, marked S.B.

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[17] M.S. vii, 110, 125, 169, 180, 182–5, etc.; xxii, 231–5.

[18] M.S. i, 153–70; vii, 247.

[19] M.S. ix, 226.

The second Sir John Stanley who inherited in 1414, had visited Man as his father's representative, as he is reminded in one of the documents, which says: " Tyme you were here, you receaved the land as heire apparent in your Father's dayes." In the earliest document of all, which is dated January 18, 1417, and is described as an Indenture made between the Lord's two Commissioners and the Deemster and 24 Keys of Man, the term " liege tenant of the Lord of Man " is used, apparently as descriptive of any resident on the Island except those in the Baronies; and the contrast is drawn between " the land of the Lord of Man," and " the liberties of the Barons." In December that same year, Sir John was in Man and signed at Castle Rushen a document stating that he had appointed these Commissioners as his representatives, to have authority over all his affairs and " to here and to determyn all manr of tresones, felonyes . . . and all other demaundes prtening to the law and custome of my forsayd Lordship of Manne, alswill at myn aune sute as at the sute of prtes (as well at my own suit as at the suit of parties)." [20]

Sir John Stanley was again in Man five years later and it is recorded that he " on the vigil of our Lady St. Mary, 1422, at his Castle of Rushen, hath asked of his Deemster and the XXIV the Laws of Man, of the points underneath written, to the which the Deemster with the XXIV given for Law that these be the points of your prerogative." [21]

Both the Sloane MS. and the Statute Book begin with another document which is undated. This opens " Our doughtful Lord and gracious, this is the constitutions of the old time, the which we have seen in our days how you shall be governed on your Tynwald days." [22] The scribe who first entered it before the other pronouncements of this period may have assumed it was earlier, though he does not follow strict chronological order in arranging his dated entries. Some authorities conjecture it was drawn up as early as 1417, as Sir John visited Man then and not again till 1422. If so, the paragraph with which it concludes, declaring judgment on the perpetrators of a rising at Kirk Michael against the Lieutenant, must either have been tacked on there in error or refer to an earlier incident of the same kind as one which is recorded as having taken place on the Tuesday after Corpus Christi (*i.e.*, the third Tuesday after Whitsunday) 1422.

On this incident of 1422, the King of Man in a " Court of all the Country " [S.B. " of all the Tenants and

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[20] M.S. iii, 150.

[21] M.S. iii, 82–98. (The spelling in this and the following extracts is modernised except when there is any possible doubt of the meaning of the word in the original spelling, when this is given in brackets.)

[22] M.S. iii, 71–74.

Commons of Man "] pronounced judgment on the Tuesday after St. Bartholomew's Day the same year. If the document beginning " Our doughtful Lord " does allude to this same incident, its date must accordingly be between June and late August, 1422, and its more general precepts be in a sense addenda to the pronouncement of the vigil of Lady Day, *i.e.*, March 24, that year. On the whole, two paragraphs about the duties of occupiers of land read very much like addenda to a statement in the document of March, 1422, on the Land setting.

Before examining that, however, it is interesting to note how many of the personnel of Manx administration and how many of the courts are mentioned in that same document, the general administrative set-up in fact. The Deemsters are mentioned a number of times and the importance of their office duly emphasised. The Keys are stated to have been " twenty-four freeholders, that is to wit 8 (the number 16 in the Sloane MS. is clearly a slip) in the out Isles and 16 in your land of Man and that was in King Orry's Days " (under Godred Crovan, Man and the Isles had of course been one kingdom). Tynwald is often mentioned, a Norse word and, as has been seen, one used in the Chronicle for an assembly held in 1237. We also read of the Comptroller, the Receiver (or Treasurer), the Clerk of the Rolls, the Water Bailiff, the Coroners, the Moars, and the stewards of the Lord's houses, and of the six courts of the six sheadings and other courts, of which the most interesting to this inquiry are the Courts of Chancery and of Exchequer.

The day of meeting and functions of these are laid down in 1422 as follows : " And be it ordained that every Monday the Chancery be holden in the Castle, and there who will present [S.B. pursue] any warrant either for the Lord or for himself, for any manner of arrest or any other cause, that he may have process out of the Court, returnable at [S.B. reasonable against] that day sevennight, or else at the next Court of the Sheading " : and " Be it ordained from henceforth that the Exchequer [S.B. Benchquire] be holden every Monday. And there all such receipts, reckonings and payments of money to be made openly and controlled " [S.B. " made before the comptroller "].

It is interesting to note that these two courts were already to meet on the same day, which was still happening when the Royal Commission went to Man in 1790. They met one after the other and consisted largely and often entirely of the same people. All the above-mentioned officials were also still in being and are noted in the Royal Commission's Report of 1791.

Sir John seems to have been for his part creditably prepared to confirm established Manx laws, customs, and procedure, and to have asked whether written laws could be produced. He was told " there was never none written since King Orry's days, but in the time of Nicholas [S.B. Michael] Blundell that we have knowledge of." There is of course no record of any written law from the Scandinavian period alluded to as " King Orry's days." The time of Blundell seems to mean Sir John's own time or that of his father. William Blundell, who though he does not remark on the surname being the same as his own may well have been specially interested in one that bore it, says,[23] " Sir John Stanley . . . brought over with him out of Lancashire a very understanding active gentleman whose name was Michael Blundell, him he made Governor." William Blundell goes on " This wise and politic English lawyer, observing the inconvenience of the Breast Laws,[24] . . . first brought in the custom and commanded it for the future, that all law cases decided either in their courts or by the Deemsters should be written down by the Clerk of the Rolls . . . and these they registered and kept as precedents." Whether it was on his advice or not, Sir John gave such an order which finds its place among the clauses of the pronouncements of 1422 and was confirmed with the rest. It runs as follows and incidentally suggests not at that time. It was necessary that the function of setting tenants and land should be deputed either to a professional agent or manager on the move from parish to parish or to a selected group of the residents in each parish, and it was not the bureaucratic but the democratic method that was followed in Man.

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[23] *A History of the Isle of Man by William Blundell, Esq., of Crosby, Co. Lancaster,* compiled 1648–56, published M.S. xxvi, and xxvii.

[24] The Manx term for unwritten laws.

It has been suggested that this paragraph implies that tenancies could be changed from year to year on the sole will of the Lord, and that the occupiers were little more than tenants at will, their ancient rights having been forgotten during the stresses and changes since 1266. That is surely, however, a quite unnecessary interpretation. There may have been caution not to declare unequivocally anything that might seem to limit the power of the Lord of the Island, so that, instead of " deliver to every new tenant his holding," the compilers wrote " deliver to every man his holding," only to qualify this immediately by " specially to new tenants," but in any case they had to set (or settle) those holdings which were doubtful or in dispute, through the jealousy and restlessness noted in the paragraph or any other cause.

Actually, except in so far as permanent policy might be involved, the question as to whether the Lord could or could not get rid of a tenant was probably of no practical importance in 1422. He was much more concerned then to hold on to his tenants and their rent than to hold on to their land. There had apparently been some squatting on waste or derelict land, and it is accordingly simply declared (in the undated document beginning " Our doughtful Lord "), " Whosoever occupieth any parcel of ground within the Land of Man . . . he ought to pay the value of his occupying without quest setting."

A document in the Manx Museum [26] seems to show that *Libri Assedationis* or Manorial Books were in use by Sir John Stanley's time and that tenants once enrolled continued to hold until they were succeeded by their heirs.

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[26] Published in *Journal of Manx Museum*, March, 1934.

For the purposes of a law suit claiming a farm called Balladoole, fragments from early Manorial Books were pieced together in the early eighteenth century, showing that it had been held successively by many tenants with the surname Stevenson, including a number before 1511 from which date the Manorial Rolls have been continuously kept and preserved. Even if there are, as a critic has suggested, two possible duplicates in the six pre-1511 Stevenson entries given, there had been at least four Stevensons in successive tenancy of Balladoole before 1511, which in all probability takes our knowledge of that particular family and its holding back to the time of Sir John's arrival.

In the document beginning " Our doughtful Lord," Sir John is told that it is proper for him not only to summon the barons to do their fealty but also to " will that the Commons come and show to you their Charters how they hold of you." It is unlikely they had written title deeds or charters ; but they could presumably tell him of the entry of their holdings and of the transfers from father to son (as in the case of the Stevensons), in the *Liber Assedationis*. If, as in view of its contents and the reference to dated events seems likely, the document containing this reference to " charters how they hold of you " was drawn up a few months after the larger pronouncement of March 24, 1422, it may possibly be a deliberate addendum to the paragraph about the Setting Quest. After all, the Deemster and the Keys were all tenants themselves, which was the greatest safeguard of Manx tenants' rights. There are however two further points to be examined, the kind and amount of service required from a Manx tenant and his freedom or lack of freedom to leave his land. The services are set forth in the " doughtful Lord " document as follows : " All your tenants of your six sheadings ought by your laws to carry your Turfs to your place, so much as your lust is to have, with all other carriages, suite, and services that you need within your land of Man, for that is use and custom within that land of long time." There was also the obligation to keep watch and ward. The other services (besides suite or attendance on the Lord, especially in his Courts) have always been called in Man " carriage services " and do not seem to have been more than a freeholder might have been expected to give in England before services were almost universally commuted there for money payments. Carriage services were still incumbent upon Manx landholders after the Act of Settlement 1703, a supplement to which defines them as follows: " four carriages to every Quarter of land (the farm of normal size, round about 100 acres) and one carriage to every cottage and Intack-holder and the same to be performed either by the labour of horses or services of men as the Governor shall think fit to order and hath been formerly accustomed and that these carriages shall be taken for the Lord's use, as his Lordship or the Governor shall think fit to employ them, and that no tenant shall be exempt . . . but such as have already been legally accustomed to be free thereof." The Keys were always so exempt but this was a privilege of office, not a different kind of tenancy. Large tenants of course sent servants while small tenants came themselves.

As to holding the tenants to their land, this was no doubt attempted, especially when tenants were scarce. But it was not only the tiller of the soil who could not, without licence, leave Man. At the court held in August, 1422, " It was ordained and proclaimed that no man, of what condition soever he be, go out of the land without special leave." A statement on this subject does not only appear once, in varied forms it seems to keep cropping up. In one place a shipman is charged to take away " no tenant or servant of the Land " on pain of imprisonment, losing his ship, and " to pay the farm of he that he carrieth away " ; in another place " whomsoever is born and resident within your land of Man, though he had paid all his debts and farm, he ought not to go out of the land without special leave." It should be remembered that the term " farm " (or rent) covers all dues, and that there were no rates or taxes for civil purposes except those it comprehends.

While Manxmen might not leave without permission, the entry of strangers was also a matter of concern, and they were under disabilities until they had been naturalised by making fealty to the Lord of Man. Merchants who were strangers were not to go further into the land than the nearest parish church. The provision " that Scots void the Land with the next vessel that goeth into Scotland upon pain of forfeiture of their goods " is famous and is usually interpreted as being due to the earlier Scottish invasions and their brief periods of dominance. We may, however, wonder whether the practice for which the Scots were well known in many parts of Europe in the sixteenth century, and off the coast of America in the seventeenth, of travelling about as hucksters (perhaps recalled by the term " Scotch draper " still sometimes used in England) had already begun. The fact that the statement about Scotsmen on Man in 1422 is sandwiched between one about merchants and one about beggars and vagabonds seems to contain some such hint!

Nevertheless, though it was assumed that the place of all Manxmen, in contrast to outsiders, was on their island, and the prohibition to leave covered everyone and not agricultural tenants or servants only, the outlook of the time permitted or enjoined a restriction of their movements. Servants were declared in 1429 to " be free once in the year, that it to say at Hallowtide, to serve in what place that they will upon our Lord's several ground," *i.e.*, they might, if they wished, go from the employ of one landholder to another anywhere on the Island except in the Baronies, each year in November. The landholders themselves, however, having more responsibility, seem to have been regarded as obliged to remain permanently on their holdings. The sale of holdings by one farmer to another can seldom have been possible when there was a glut of land, since the holdings would have no purchase value unless they were in position or fertility exceptionally attractive. Had a tenant who wished to leave been in a position to present a suitable would-be successor, it is likely the transfer would have been permitted, but it appears that the Setting Quest could have insisted on the outgoing tenant taking up another farm in that case. The main statement on the subject, which appears in the undated " doughtful Lord " document, though somewhat obscure, is usually interpreted to mean that the Quest could set a suitable tenant, such as a farmer's son, against his will, which is borne out by documents of the next century, one of which runs " the husbandman's son is my Lord his Honour's Treasure, for he is to be a tenant." [27] A statement of 1429, immediately before that just quoted about servants, seems to imply that the same applied to the husbandman's daughter if she had succeeded to her father, except when her husband took over her responsibility. The passage runs: " If any man wed a wife that is in farm, that her husband may pay her debt and freely to come to her husband, and not to be set in none other place but to be freed by her husband." This may, it may be conjectured, be paraphrased, " If a man marries a wife who is responsible for payment, he may take on himself her obligation, and then, being freed from her responsibility by her husband, she may take up her married life with him without being liable to be set in another holding, as she might have been if she had transferred her liability to anyone else." The passage was apparently misunderstood by the Statute Book scribe, and still more by the compiler of a much later collection of Spiritual Laws, and it was altered without acknowledgement by stages until it seemed to imply that every husband was responsible for all his wife's debts. As we shall see, the " temporal " debts of man and wife were in Man their joint concern, as contrasted with the " spiritual " debts (*i.e.*, the church dues for the funeral, etc.), which came out of the " dead's part ", but this particular passage in the pronouncement of 1429 appears in its earliest form to be concerned with the obligations of landholders and not with debt in general. Whether for the husbandman and his son or daughter to have been so tied to the land implied a servile position is a matter open to difference of opinion. It should however be remembered that the outlook of the fifteenth century was still based on *status* rather than *contract*, and that the conception of " my station and its duties " as applicable to everyone was generally accepted. In Man at least the tenants as well as the Lord had rights. The Deemsters were charged, in 1422, to " govern truly between the Lord and his Commons and between Party and Party." The Deemster's oath, as administered up to 1765 when the Lordship of Man was transferred to the Crown of Great Britain, ran : " You shall without respect of favour or friendship, love or gain, consanguinity or affinity, envy or malice, execute the laws of this Isle justly betwixt the Lord and his people of this land, and betwixt party and party, so indifferently as the herring back-bone doth lie in the midst of the fish." This is still the Manx Deemsters' oath, the words " our Sovereign Lord the King and his subjects within this Isle " having replaced " the Lord and his people of this land."

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[27] *Statute Book* at date 1577.

D. The Ecclesiastical Courts. Succession to personal property, and wills which were concerned with that only, lay in the sphere of the ecclesiastical courts.

The fact that the church of Western Christendom was a single organisation gave the life of a local church a continuity transcending the changes of civil governments. The diocese of Sodor, or the Sudreys or Southern Isles which included Man, later called Sodor and Man, remained part of the province of Trondheim for some two centuries after Man had ceased to be part of the domain of Norway. It was not until 1458, more than half a century after Man was given to the Stanleys, that the diocese was made suffragan to the Province of York by Papal Bull. In 1542, Henry VIII, ignoring the Pope's action, again ordained that the bishopric and diocese of Man should be " annexed, joined and united to the said province and metropolitical jurisdiction of York."

Meanwhile, Synods were held under Bishop Simon

(1229), Bishop Mark (1291), and Bishop Russell (1350)[28] and each issued a series of edicts. The first of these, assuming that wills fell in the province of the church, fixes the charge for proving them at 32 pence, from which something is to be taken for the poor. With regard to intestate deaths it says, "The effects of the intestate should be administered subject to the will of the bishop of the diocese, or, in his absence, of his vicar-general." It is also laid down that "if a man or woman have died and left no goods to satisfy the church for the burial, then those who would have looked to have their possessions if they had died rich, that is to say their nearest by blood, shall satisfy the priest and clerks for the funeral." Thus we are given some idea of what was assumed to be natural succession and natural responsibility.

Bishop Mark's edicts are much fuller, and though, like Bishop Simon, and like those who drew up "spiritual laws" in Man after the Reformation, he has a good deal to lay down about tithes and such other mundane matters, he is also much concerned with pastoral responsibilities. Bearing on the matter of inheritance, besides treating the making of wills as a duty of the Christian death-bed, it is laid down again that "when anyone shall have died intestate, all his goods are to be sequestered in the hands of the bishop, through the rector as vicar of the locality, until it be settled by the bishop what is to be done, and none of the executors are to take possession of the property of the deceased until they are told the final decision before the rector, or official, or archdeacon." That remained the practice and responsibility of the Bishop's Courts in Man for some five centuries, not, so far back as the records go, that they should be permanently confiscated but that they should be distributed on the same lines as a reasonable will.

That Man was then simply conforming to the practices of Western Christendom in treating these matters as in the province of the Church is insisted upon by the pronouncement in Bishop Mark's edicts: "In conformity with the canon law, all matrimonial causes, and causes testamentary of widows, orphans, crusaders, and unfortunate persons, are subject to the decision of the Church." It is in continuing to do so for so long and with so little modification that she was exceptional; and also in the nature and scope of the property and testamentary rights it fell to her task there to administer.

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[28] M.S. ix, 176–210.

Except that the local representatives of the Church in Man declared in 1610, perhaps under some degree of pressure, that "they ought to have no laws but what cometh from the Lord of this Isle," the Reformation left the Church Courts and the scope of their activity unaltered. A statement of *Spiritual Laws, which have been formerly used and is continued and put in Execution*" apparently written down about 1589 was presented by the two Vicars General to John Ireland, Lieutenant of the Island, when he called them before him in 1610. The Lieutenant, the Receiver, and the two Deemsters countersigned the account of the transaction, and this first set of Spiritual Laws accordingly took their place in the Statute Book, where they can still be found. The civil power, having been acknowledged supreme, was content to leave the Church Courts and their laws as they were.

The "this-worldly" character of many of these first written "spiritual" laws is evidenced by the opening paragraph beginning: "First, that all Bishops shall have their herring Scout and fishing Boat"! Other clauses are however directly concerned with the claims of widows and children and will be quoted in their place.

The civil power occasionally intervened to reduce or limit church dues, or to insist that "every man may make or cause to be made his own will by whom he shall please to direct," [29] but did not interfere to any radical extent, until conflict arose between the Ecclesiastical and the Civil powers over the disciplinary side of the activities of the Church Courts in the time of the indomitable Bishop

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[29] *Statute Book*, 1643.

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[29] *Statute Book*, 1643.

Thomas Wilson (born 1663, Bishop of Sodor and Man 1697–1755). The contention was then concerned not so much with the content of the laws as with their being enforced on high officials, their families and servants, and members of the garrison. The Bishop's refusal to exempt anyone, even the wife of the Governor, whom he called upon to make public acknowledgment of and ask forgiveness for having been guilty of slander, led to his imprisonment in 1722, followed ultimately by his release, the consideration of his case by the Privy Council and the Crown Lawyers in England, and his rapturous reception by the people of Man, who identified his cause with their ancient freedoms. The functions of the courts in the supervision of moveable succession, wills, and the rights of fatherless or motherless children, were however unaffected by all this controversy.

In 1791, the Attorney-General explained the scope of the responsibility of the Spiritual Courts to the Commission of Inquiry, which was then visiting Man, as follows : " these Courts . . . have . . . beside their spiritual authority, the cognizance of such civil affairs as fall within ecclesiastical cognizance in England, and likewise of various others ; particularly it not only belonged to them to determine the validity of wills, and to grant administrations ; but they sustained all causes respecting them, or concerning the legacies and debts of the deceased, within one year and a day from the probate of the will . . . and likewise all suits against executors and administrators as such, at any time within two years." [30] And so it remained until 1883 when such business was transferred from the Ecclesiastical to the Civil Courts.[31]

Anne Ashley.

ADDENDUM.—Whether naturalisation was required of Englishmen, as well as of the " Irishmen, Scottishmen, or other aliens " referred to in a Manx statement of 1429, might be disputed. In 1596, when the Island was directly under Queen Elizabeth during a dispute over the Stanley succession, it was pronounced treasonable so to interpret this phrase. The distinction according to another early statement (1422) was between anyone who was the Lord's " born man or else had made faith and fealty " and all others. Englishmen brought or sent over by the Lord or his officials, many of whom came from his English estates, were presumably accepted as his men by birth, along with natives of the Island.

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[30] M.S. xxxi, 109.

[31] (Isle of Man) Judicature Act, 1883.

RECENT LEADING SCOTTISH CASES

By David M. Walker, M.A., LL.B., PH.D., Advocate

CONTRACT—Liability of Crown for breach of contract.

Several points of interest were raised in *Cameron* v. *Lord Advocate*, 1952 S.C. 165, of which the most important is probably the question how far the Crown may be sued for breach of contract. The circumstances of the case were that a Scotsman entered into an agreement for employment in a civilian capacity in the British Cameroons with the Custodian of Enemy Property, Nigeria. On arrival there the pursuer was informed that there was no appointment open for him. He accordingly sued the Crown for breach of contract, and Lord Mackay, sitting in the Outer House, repelled the Lord Advocate's plea to competency, and held that the Crown might be liable for breach of a contract for purely civilian employment. His Lordship put aside the cases arising from employment in the service of the Crown proper, such as in the armed forces, which stand in a rather special category. Moreover, he pointed out that there had been a repudiation of the contract *ab initio* rather than a dismissal after the employment had been entered on and that the appropriate doctrine of law might have been recompense or reimbursement, but even in such a case the Crown would have been liable under the Crown Proceedings Act, 1947, s. 21. In the result, therefore, the Crown is seen to be in exactly the same position as an ordinary litigant so far as concerns paying damages for the repudiation of an agreement for employment in a civilian capacity. Specialties still attach to the armed forces and the civil service. This branch of law has not been much expounded in Scotland and the decision is of considerable importance.

DIVORCE—Collusion and lenocinium.

The pleas of collusion and lenocinium as defences to an action of divorce for adultery tend frequently to overlap and become confused in the circumstances of a particular case. It was thus in *Riddell* v. *Riddell and the Lord Advocate*, 1953 S.L.T. 9. A wife brought an action of divorce on the ground of her husband's adultery. The Lord Advocate lodged defences and pleaded collusion. It appeared from the proof that the wife had, after the husband had lost interest in her, become very friendly with another man. It was not disputed that the husband had in fact committed adultery. The Lord Advocate's intervention was based on collusion, but at the debate in the Inner House it became evident that his defence was truly founded on the plea of lenocinium. In the result the court was enabled to point the distinction between the two pleas and, on the facts, to find that decree of divorce should be pronounced. Collusion involves a fraud on the court: the observations of Lord Dunedin in *Walker* v. *Walker*, 1911 S.C. 163, and *Fairgrieve* v. *Chalmers*, 1912 S.C. 745, on which the modern oath of calumny is founded, were that collusion involves putting forward a false case or withholding a just defence by agreement between the spouses. Lenocinium, on the other hand, involves that the so-called "innocent" spouse is not truly innocent, as having co-operated in, induced or instigated the adultery complained of, and has therefore no title to complain of a matrimonial wrong of which he or she is equally guilty by accession. The contrast comes out very clearly in this case, and it is apparent that what the Lord Advocate was truly complaining of was not that the parties were conspiring to present a case for divorce when there had been no adultery (which would be collusion) but that there had been adultery by the husband, which was caused by the wife's indiscreet friendship with the third party and for which she was therefore responsible art and part. In the circumstances of the case nothing that the wife had done had encouraged the husband's adultery. The case is very instructive on the interrelation of the two defences as in no previous case have the two been considered fully together.

NEGLIGENCE —Trespasser on vehicle.

Carney v. *Smith*, 1953 S.L.T. 74, deals with circumstances which must arise very frequently. A child climbed on to the step at the rear of a motor-van, was thrown off when the van moved away, and was injured in consequence. The legal interest of the case arises from the question whether the doctrine of "invitee, licensee, or trespasser" applied to a person on a motor-vehicle. In England this principle applies much more widely than to land and buildings and it has been applied to vehicles, *e.g.*, *Twine* v. *Bean's Express, Ltd.* [1946] 1 All E.R. 202. In Scotland the principle is not native law at all and did not appear until the decision of the House of Lords in *Dumbreck* v. *Addie*, 1929 S.C.(H.L.) 51, and it has not hitherto been extended beyond cases relating to heritable property. The opinions in *Carney* v. *Smith* indicate that probably no such extension should be made. The case, it was held, fell to be determined on general principles of negligence, particularly those applied in *Taylor* v. *Dumbarton Tramways*, 1918 S.C.(H.L.) 96. The driver should have taken the care which was reasonable in the circumstances, without confining him to any specific standard of duty according to the category within which the pursuer could be fitted. This is a welcome decision, asserting reliance on broad Scottish principles in place of extending an unnatural foreign importation, which seems both unnecessary and undesirable.

CONTRACT—Indemnity against claims of damages.

The practitioner in reparation is very familiar with the manifold statutes and regulations which impose extremely high and sometimes almost impossible duties of care on employers to make their premises safe. A case of breach of statutory duty is nowadays very commonly made in cases of industrial accident and injury and to this the name of " statutory negligence " has been given. Breach of the duty is made negligence by statute, though there may have been nothing involving fault as that term is generally understood : *McMullan* v. *Lochgelly Iron Co.*, 1933 S.C.(H.L.) 64, *per* Lord Wright at p. 76. The same learned Lord later, however (*Caswell* v. *Powell Duffryn* [1940] A.C. 152, 178), distinguished cases of common law negligence and breach of statutory duty. An interesting sidelight on this controversy in the law of delict is cast by a case on contract, *Hamilton* v. *Anderson*, 1953 S.L.T. 77. Ship-builders made a contract with contractors for the execution of certain work : the contract provided for indemnifying the ship-builders against all claims incurred " at common law or under the Workmen's Compensation Acts. . . . " An employee of the contractors was injured and subsequently recovered damages against the ship-builders in an action founded on breach of certain provisions of the Factories

Act, 1937. Did the words " at common law " in the indemnity provision cover this eventuality, so as to enable the ship-builders to recover from the contractors under the contractual indemnity the damages they had had to pay to the employee, together with their expenses? It was held that a claim for damages brought under the Factories Act was a claim " at common law." Apart from the practical consideration that such a clause would be difficult of application in the case of an action of damages founded both on common law negligence and breach of statutory duty and determined by a general jury verdict in favour of the pursuer, the court took the view that in the case both of common law negligence and of breach of statutory duty the liability and right to damages arose at common law: but the negligence founded on might consist in the failure in a specific duty of care imposed either by common law or by statute, and the latter might overlap the former and impose a higher standard of duty, or impose a different onus of proof. As the Lord President put it: " ' Statutory negligence ' is none the less negligence. It infers that breach of duty which underlies every common law action for *culpa*." Thus indirectly the conception of " statutory negligence " gains support.

CONTRACT—Error—Sale of heritage.

Contract also supplied the subject-matter of another case of considerable interest, *Anderson* v. *Lambie*, 1953 S.L.T. 82. The pursuer owned a farm and an adjacent area of ground leased to the National Coal Board. He sold the farm, describing it in the missives by name and extent, and as occupied by certain tenants.

A disposition was executed which contained a description of the lands which erroneously included the lands leased to the Coal Board, but the agents for both parties thought that the subjects described and contained in the disposition were the same as those in the missives. The disposition was recorded and four years later the seller brought a reduction, founding on " error in expression " and offering to execute a fresh disposition of the farm only. The court dismissed the action.

The only available report deduces the *ratio* as being that the court " did not enjoy the power to ' reform ' the contract," but the decision is surely more fundamental than that. That proposition is trite law: *Inglis* v. *Buttery*, 1878, 5 R. (H.L.) 87, 96; in any event the error was not merely clerical or a matter of "expression." The true view of the case seems to be that where a disposition of heritage has been executed and accepted and put on the record *in bona fide* and without challenge from either side, it cannot be impeached subsequently by showing that it has not been framed so as truly to implement the missives it supersedes or the apparent intention of parties. The seller's remedy is against the agent responsible for the mistake, if that mistake was due to professional negligence. The case is quite without exact precedent; it arises in a tract of law not much illustrated by decisions and such as there are are troubled by specialties, and it may be that the ratio of the decision is not very readily discoverable or wholly beyond dispute. It will certainly provoke some thought among conveyancers.

RECENT LEADING ENGLISH CASES

By W. A. Elliott, m.c., b.l., Advocate, and of the Inner Temple, Barrister-at-Law

NEGLIGENCE —Injury to child —Negligence of driver of motor vehicle—Liability to mother for shock.

King v. *Phillips* [1953] 2 W.L.R. 526 raises the perennial question for the common lawyer whether the consequences of an accident were too remote to be reasonably foreseeable. A taxicab driver backed his cab into a small boy on a tricycle, who was slightly injured. His mother heard him scream and, looking out of an upstairs window some 70 or 80 yards away, saw the tricycle under the taxicab but could not see the boy. He eventually ran home, but his mother had suffered nervous shock, an injury for which she later claimed damages against the taxi driver's employers. The Court of Appeal held that the driver was not in breach of any duty to the plaintiff as no reasonable person would have anticipated that injury either physical or nervous could have been caused to her by the backing of the taxi. In this respect the case was straightforward in following *Bourhill* v. *Young* [1943] A.C. 92, and in particular the principles laid down therein by Lords Thankerton and Macmillan. It remains, however, of more than passing interest, owing to Denning L.J.'s judgment to the effect that the taxi driver did owe a duty to the plaintiff of which he was in breach, but that the consequential damage of nervous shock was too remote to be reasonably foreseeable. Counsel for the appellant mother had argued that the duty owed by the taxi driver was to everyone in the vicinity (*Hambrook* v. *Stokes Brothers* [1925] 1 K.B. 141) and as he was in breach of that duty then he was liable for all consequences whether they could be foreseen or not (*Re Polemis* [1921] 3 K.B. 560). Denning L.J. was prepared to accept the first proposition as he could not see how there could be a duty to a particular bystander not to cause her physical injury but no duty not to cause her emotional shock. He thought there was a plain duty owed to everyone in the vicinity not to injure them physically or emotionally and said, " If you view the duty of care in this way, and yet refuse to allow a bystander to recover for shock, it is not because there was no duty owed to him, nor because it was not caused by the negligence of the driver, but simply because it was too remote to be admitted as a head of damage." With all respect to the learned Lord Justice it is difficult to see what duty of care regarding physical or emotional injury could possibly exist between a taxi driver and a woman in an upstairs window 80 yards away. On the second question of consequential damage being too remote, damage may possibly be too remote under Scots law if it was not reasonably foreseeable, but since *Thurogood* v. *Van Den Berghs & Jurgens, Ltd.* [1951] 2 K.B. 537 is the argument still open in the Court of Appeal?

NEGLIGENCE
Safe system of work—Window-cleaning.

The case of *General Cleaning Contractors, Ltd.* v. *Christmas* [1953] A.C. 180 has now come through the House of Lords without disturbing the decision of the Court of Appeal. This case has already been commented upon (Vol. LXIV, No. 2) and it will be recollected that it concerned the employee of a window-cleaning company suing his employers for negligence in failing to provide a safe system of working. He was cleaning the windows of a club when the sash slipped knocking his hand from its hold and causing him to fall. The House of Lords held that the employers failed to provide a safe system, not because they were at fault (as averred by the plaintiff in his Statement of Claim) for failing to provide hooks and safety belts, but because they had neither given instructions to ensure that the windows should be tested before cleaning nor provided any apparatus, such as wedges, to prevent the windows from slipping down. In leaving it to the initiative of individual workmen to take precautions against a common danger they had accordingly failed to provide a safe system. It is to be observed that if the plaintiff had been held to his Statement of Claim as a Scottish pursuer would have been to his pleadings, he would never have recovered as these grounds of fault were never specifically founded upon. It is also interesting to consider whether the result arrived at would fit Lord Dunedin's well-known dictum in *Morton* v. *Dixon*, 1909 S.C. 807, 809. The evidence in the case was that other window-cleaning companies did not in like circumstances take the precautions held to be necessary; and so the first leg of the dictum clearly does not apply. Could it be said that the suggested precautions were so obviously wanted that it would be folly in anyone to neglect to provide them? It seems difficult to convict the employers of folly for doing merely what they and all other window-cleaning companies did in similar circumstances. Yet Lord Reid in his judgment clearly had Lord Dunedin's dictum in mind when he said "the need to provide against the danger of a sash moving unexpectedly appears to me to be so obvious that, *even if it were proved that it is the general practice to neglect this danger*, I would hold that it ought not to be neglected and that precautions should be taken." It may be noted that although the judges of the House of Lords all preferred the insertion of wedges as the proper precautions, the judges of the Court of Appeal preferred ladders or safety belts. Earl Jowitt, Lord Oaksey and Lord Tucker also made statements on the proof of failure to provide a safe system of working which are likely to have repercussions beyond the sphere of window-cleaning.

NEGLIGENCE —Railway—Child trespasser— Injury by train.

In *Edwards* v. *Railway Executive* [1952] A.C. 737 the facts were that a boy of nine was playing with another boy on a railway line and was injured by a train. He subsequently brought an action against the owners of the railway, alleging negligence on their part. There was evidence to show that other children from a neighbouring recreation ground, but not this boy, had been accustomed to break through the fence enclosing the line and had made a slide down the embankment, but the fence had been repaired wherever damage had been observed. It was contended on behalf of the child that he and the other children had all become licensees to enter the defendants' premises and had been tacitly permitted to toboggan down the embankment. The cases of *Cooke* v. *Midland Great Western Ry. of Ireland* [1909] A.C. 229 and *Lowery* v. *Walker* [1911] A.C. 10 were founded upon in support of this proposition. It was held that the boy was a trespasser and not a licensee and that accordingly the railway owners were not liable. It will be remembered that in *Cooke* the ingress to the trap was an open pathway known to be used by children and this was held to amount to a tacit licence to enter. But a licence is not inferred because every possible step has not been taken to exclude intruders. The present case was more in line with *Addie & Sons* v. *Dumbreck* [1929] A.C. 358 where the trap in question was surrounded by a hedge inadequate in itself to keep out the public, but children from the neighbouring playground had been warned to keep off, and were accordingly trespassers. In the present case the boy accompanying the injured plaintiff had formerly been warned off the *locus* by one of the defendants' employees. The principle to be derived from the case appears to be that where defendants know that unauthorised persons habitually trespass upon their property they must show that they resent intrusion and take steps to prevent it, but neither omission to take every possible step nor the knowledge that intrusion has occurred is in itself sufficient to support the inference of the grant of a tacit licence.

CONTRACT—Penalty clause—Hire purchase.

It is well settled that a provision in a contract for the incurring of a penalty in the event of a breach will not be enforced according to its terms unless it admits of being construed as a reasonable pre-estimate of damages. But it is not always so clear what is in fact a purely penal provision. The recent decision of the Court of Appeal in *Cooden Engineering Co.* v. *Stanford* [1953] 1 Q.B. 86, relating to penalty clauses in hire-purchase agreements, focuses attention upon a possible differentiation between the law of England on this matter and that of Scotland as illustrated in *Bell Bros.* v. *Aitken*, 1939 S.C. 577. The facts were that the plaintiffs agreed to hire a second-hand motor-car to the defendant for a sum of £412 payable in monthly instalments but under condition that the hirer could at any time determine the agreement on payment of all instalments then falling due and unpaid plus a sum for depreciation. By clause 11 of the agreement the owners were also entitled to terminate the hiring and retake possession of the car should the hirer, inter alia, fail to make any payment under the agreement, and on such termination the hirer should be liable for the full balance of the £412 together with all costs and interest thereon at the rate of 10 per cent. The hirer having fallen into arrears with instalments the owners terminated the agreement, retook possession of the car and sued him under clause 11 for the unpaid balance of the instalments.

The hirer defendant contended that the clause was a penalty and the sum claimed was accordingly not recoverable. Croom-Johnson J. held that the question of penalty did not arise. This was also the decision reached by the First Division in *Bell Bros.* (*supra*), where in like circumstances similar clauses were held merely to lay down the financial conditions under which the owners could retake possession of or the hirer could return the car. The decision of Croom-Johnson J. was subsequently reversed by the Court of Appeal, who held that the sum claimed was a penalty and not recoverable. Jenkins L.J. delivered a dissenting judgment in which he said that the sum prescribed under clause 11 became payable not because the hirer had committed a breach of contract, but because the hiring had been determined. The sum was accordingly not a penalty in the real sense. In view of the increasing popularity of hire-purchase agreements throughout the country, expositions of the law on this subject are always of importance. But one cannot say that the limits of the penalty area in this branch of the law are as yet clearly defined.

RECENT PRIVY COUNCIL CASES

COMMON LAW —Monogamous marriage.

Isaac Penhas v. *Tan Soo Eng* ([1953] 2 W.L.R. 459) was an appeal from the judgment of the Court of Appeal, Singapore, dismissing the appeal of the appellant from a judgment of the High Court. The respondent had petitioned for letters of administration of the estate of Abraham Penhas, deceased, against which the appellant had entered a caveat. The trial of an issue in the following terms was directed: " Whether the petitioner Tan Soo Eng is or is not the lawful widow of Abraham Penhas, and if the answer is in the affirmative, when the said Tan Soo Eng married the said Abraham Penhas." It was held that the respondent had been lawfully married to the deceased on or about December 22, 1937. The question on the present appeal was whether the conclusion reached in the courts below was right that a marriage celebrated in Singapore between a Jew and a non-Christian Chinese in a modified Chinese form constituted a valid marriage according to the laws of the Colony of Singapore. The respondent and the deceased, who at all material times were domiciled and resident in Singapore, were British subjects. Neither was married in December, 1937, the date of the ceremony on which the respondent relied. From that date until the deceased was murdered by the Japanese, shortly after the fall of Singapore in February, 1942, they lived together as man and wife and had two children. The appellant was a brother of the deceased, and the executor of his last will and testament executed on April 3, 1936. The appellant had not applied for probate of the will.

There was no form of a ceremony of marriage which was applicable to both parties, and they seem to have adopted a composite ceremony, the wife worshipping according to her Chinese custom and the husband according to his Jewish custom. It was contended for the appellant that the Christian Marriage Ordinance of Singapore, 1936, applied to the parties and that no marriage was valid unless celebrated in accordance with that ordinance; that the deceased had not the capacity to contract a polygamous marriage; that the ceremony adopted was of such a character that it could give rise only to a polygamous marriage; that there was no evidence to justify the inference that there had been a valid common law marriage; and that the equivocal nature of the ceremony and the other evidence did not establish the *consensus ad idem* necessary to prove a valid common law marriage of a monogamous nature. The Board held that that ordinance only applied to marriages in which one of the parties was a Christian, and it was not suggested that either party to the marriage was a Christian at the time. Nor at the material time was any ordinance in force comparable to the Civil Marriage Ordinance of 1940. Their Lordships did not think it necessary to consider in detail the question whether a Jew domiciled in Singapore had the capacity to form a polygamous marriage, as to which no evidence was given, or to deal with the contention that the ceremony adopted, which was not entirely in accordance with Chinese rites, was only consistent with or raised a presumption of a polygamous marriage. *Yeap Cheah Neo* v. *Ong Cheng Neo* ((1875) 6 P.C. 381) decided that the English common law was in force in Singapore in so far as it was applicable, but that the Charter of 1826 provided that the court of the Colony was to exercise jurisdiction as an Ecclesiastical Court in so far as the religions, manners and customs of the inhabitants would admit. The principal question, therefore, was whether, in 1937, the religions, manners or customs of Jews or Chinese domiciled in Singapore contained anything which prevented them from contracting a common law monogamous marriage. No case was cited which suggested that mixed marriages between domiciled inhabitants of different religions or races could not be validly contracted. On the contrary, *Carolis De Silva* v. *Tim Kim* ((1902) ix S.S.L.R., App. 8) was authority that they could. In accordance with those decisions the Board held that the common law of England, was in force in Singapore in 1937 except in so far as it was inapplicable and except in so far as it was necessary to modify it to prevent hardships on the inhabitants, who were entitled by the terms of the charter to the exercise of their religions, manners and customs.

The ceremony performed in the present case was indubitably intended by the parties to constitute a valid marriage. The only doubt was whether the marriage intended by the parties to be constituted by the ceremony was a common law monogamous marriage or a Chinese polygamous marriage. That question was not raised in the courts below and the respondent was not cross-examined on the subject. Abraham Penhas was dead, and in such circumstances it would be wrong to invalidate a marriage so solemnised, followed by years of cohabitation as man and wife, and to bastardise the two children of the marriage, even if the other evidence was equivocal as to the status intended. But it was not necessary to decide the case on that narrow ground, as the evidence sufficiently proved a common law monogamous marriage. The wishes which the respondent and her mother expressed for a church marriage, the reason why a modified Chinese ceremony was substituted, the presence of Jewish friends at the ceremony, the words spoken by the Chinese man who performed the ceremony as to a life-long union, the cohabitation as man and wife which followed and continued till the husband's death, the introduction by the deceased to a Chinese pastor of the respondent as his wife, and last, but not least, the baptism of their children as Christians with the approval of their father, all indicated that the spouses intended a common law monogamous marriage. In a country such as Singapore, where priests were few and no true parochial system existed, where the vast majority were not Christians, it was neither convenient nor necessary that two persons such as the respondent and the deceased should be required to call in an episcopally ordained priest to effect a marriage. The appeal was accordingly dismissed.

PROVOCATION —Retaliatory act.

Att.-Gen. of Ceylon v. *Kumarasinghege Don John Perera* ([1953] 2 W.L.R. 238) was an appeal by the Attorney-General from a majority judgment of the Court of Criminal Appeal of Ceylon which had set aside the conviction of the respondent, Kumarasinghege Don John Perera, of the murder by shooting of a woman named Kumarihamy Samaranayake. The woman and her husband lived with five of their children on land adjoining that on which the respondent lived with his family. There had been ill-feeling between the two families, and on July 29, 1950, the respondent shot and killed the woman and her husband Samaranayake, and two other members of the family, and wounded two of the other children. Stone-throwing by members of the deceased's family at the respondent's house, with accompanying verbal insults, were alleged to have constituted provocation sufficient to reduce the offence to culpable homicide not amounting to murder, within the meaning of section 294 of the Penal Code of Ceylon. The Court of Criminal Appeal of Ceylon held, by a majority, that the jury had been misdirected on the law relating to provocation, and they ordered a new trial.

The Board stated that the question raised by the appeal was one of considerable importance in the law of Ceylon, for not only did there appear to be a considerable conflict of judicial opinion on the matter among the judges forming the Court of Criminal Appeal, but in *Naide* v. *R.* ((1951) 53 C.N.L.R. 207) a judgment was given in direct conflict with that now under appeal. It was argued before the Court of Criminal Appeal that the trial judge had wrongly directed the jury that a defence of provocation could not succeed, and that the charge of murder could not, therefore, be reduced to culpable homicide not amounting to murder, unless the action which the respondent took in consequence of the provocation was reasonably commensurate with the degree of provocation offered to him. The Court of Criminal Appeal held that that was a misdirection and the present appeal was against that decision.

A preliminary point was taken that the Board had no jurisdiction to entertain an appeal by the Crown in a criminal case. It was submitted that if a decision had once been given in favour of a prisoner no appeal could be brought, reliance being placed on the doctrine that after an acquittal a prisoner could never be put in peril again. The order of the Court of Criminal Appeal in the present case, the Board stated, did not amount to an acquittal. It merely set aside the verdict and sentence and ordered a new trial, though no doubt the effect of the order was to restore the prisoner to the position of one who had not been tried. The Board did not on that ground decide that they had jurisdiction to entertain the appeal, but because a series of cases had, in their opinion, decided that Her Majesty in Council had power to entertain an appeal from any Dominion or Dependency of the Crown in any matter, whether civil or criminal, by whichever party to the proceedings the appeal was brought, unless that right had been expressly renounced. The following cases were referred to: *R.* v. *Bertrand* ((1867) L.R. 1 P.C. 520); *R.* v. *Murphy* ((1868)

L.R. 2 P.C. 35); *R.* v. *Coote* ((1873) L.R. 4 P.C. 599); *Ibrahim* v. *R.* ([1914] A.C. 599); *Nadan* v. *R.* ([1926] A.C. 482); and *Ambard* v. *Att.-Gen. for Trinidad and Tobago* ([1936] A.C. 322).

On the facts, the case made at the trial was that ill-feeling had long existed between the respondent and the family of the deceased, and it was sought to reduce the crime from murder to manslaughter by reason of certain provocation consisting of stone-throwing by the woman's family, and threats uttered by them, so that, the respondent said, he was suddenly provoked and at the same time felt serious danger to his life, and that he did not know what happened as he had lost control over himself. The question for decision depended entirely on the true construction of section 294 of the Ceylon Penal Code, which did not provide for any doctrines of English law to be imported into the criminal law of Ceylon. Section 294 provided: " . . . Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation. . . ." To reduce the crime from murder to manslaughter the offender must show, first, that he was deprived of self-control, and, secondly, that that deprivation was caused by provocation which, in the opinion of a jury was both grave and sudden. In directing the jury that they must ask themselves whether the kind of provocation actually given was the kind which they, as reasonable men, would regard as sufficiently grave to mitigate the actual killing of the woman, the judge was, in the opinion of the Board, merely directing the jury how they should determine whether the provocation was grave. The words " sudden " and " grave " were relative terms, and must at least to a great extent be decided by comparing the nature of the provocation with that of the retaliatory act. It was impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation, otherwise some quite minor or trivial provocation might be thought to excuse the use of a deadly weapon. A blow with a fist or with the open hand was undoubtedly provocation, and provocation which might cause the sufferer to lose a degree of control, but would not excuse the use of a deadly weapon. In the opinion of the Board it was wrong to say that because the code did not in so many words say that the retaliation must bear some relation to the provocation it was true to say that the contrary was the case. The summing-up was impeccable, and the appeal from the Court of Criminal Appeal was allowed.

PRIZE—Capture of partly built vessels.

In *Schiffahrt-Treuhand, G.m.b.H. and Others* v. *Her Majesty's Procurator-General* ([1953] 2 W.L.R. 209) consolidated appeals were brought by the respective former German owners of five objects against decrees made by Lord Merriman P., sitting in Prize, which dismissed the claims of the appellants and pronounced the objects to be liable to confiscation by the Crown, and condemned them as good and lawful prize. The objects, five partly built vessels belonging to enemy nationals, were in German ports at the time of the capture of those ports in May, 1945, by or with the co-operation of the British navy, and were themselves captured as a result of the capture of the ports. They were: Hulls 507 and 508 (the Flensburg structures), which were under construction on the stocks at Flensburg in May, 1945, and were not ready for launching. The first-named appellant claimed them as its property. Numbers 347 and 348 (the Lübeck structures), which were on the stocks at Lübeck. These were claimed by the second appellant company as its property. The motor-vessel *Hermes*, which had been launched but was not completely constructed in May, 1945. In October, 1944, she was towed to Emden for completion, and was there bombed. In May, 1945, she lay in the harbour at Emden damaged, grounded and still incomplete. The third appellant admitted that the *Hermes* had acquired the character of a ship, but claimed her as its property. Proceedings were instituted in the summer of 1947 in the Prize Court, the Procurator-General asking for condemnation of the objects as good and lawful prize. In the case of Hulls 507, 508, 347 and 348, the writs were dated respectively, July 22, August 23, August 6 and September 1. In the case of the *Hermes* the writ was dated August 13. The writ was in each case served by affixing it, or a copy of it, on a portion of the vessel.

The Board held that the Prize Court had jurisdiction in every case of seizure or capture of a ship alleged to have belonged to the enemy and to decide " according to the course of admiralty and the law of nations " whether it should be condemned as true and lawful prize. "Prize" in that connection meant more than "taking" or seizure. "Captured in prize" or "as prize" was not one species of capture. The physical capture of a ship was the same thing as taking her in prize, and a Prize Court had jurisdiction to decide "according to the course of admiralty and the law of nations" the fate of every vessel so captured. The fact that captors wished or intended to make the vessel a prize at a later date was irrelevant. She became a prize subject to the jurisdiction of the Prize Court from the moment of capture. It was the intention to seize, not the intention to seize in prize, which gave jurisdiction. The ships and other objects in the ports were "captured" at the same time as the ports themselves. They became, in Lord Parker's phrase in *The Roumanian* ([1916] A.C. 124, at p. 138), "enemy goods seized on enemy territory by the naval forces of the Crown." Applying the test in Dana's note to Wheaton's *International Law*, 8th ed., p. 451, an unfinished ship in the course of construction could be a proper subject of prize, at any rate when captured by or with the assistance of naval forces, for its completion made it available for wartime use. The structures in question, though not capable of floating at the time they were captured, were none the less to be regarded as "maritime property in a maritime town," and were rightly to be regarded as maritime prize.

The last question in the appeal affected only Hulls 507 and 508, which were under construction in the port of Flensburg when it was occupied by a detachment of the British army and by British naval forces on May 10, 1945. The appellant submitted that the seizure of those vessels was invalid because seizure in prize was an act of hostility and because all hostilities were brought to an end on May 8, 1945, by the Act of Military Surrender. The Crown's submission was that the right to seize in prize persisted till June 5, 1945, when the four major Allied Powers signed the declaration at Berlin by which they assumed supreme authority with respect to Germany, and which admittedly brought to an end all hostilities between the Allied Powers and the German State, and terminated the right of seizure of ships and maritime property. It was held that there was no necessity to imply a condition that all rights *jure belli* were to be forgone by the victor. The Allies were, for example, fully entitled to order their forces to advance further into German territory, and the Board had no doubt that they remained entitled to seize the German vessels on the high seas in prize between those two dates—May 8 and June 5, 1945. There were additional and independent grounds for that conclusion. First, there was no surrender on May 8 of the German Government or of the Reich itself, which was entitled to raise new forces and to appoint new military leaders with instructions to continue the struggle. Secondly, Germany had been waging war in alliance with Japan, and that war continued after the surrender of the German armed forces. When war was continued by partners as allies the unconditional surrender of one could not protect it against the right of seizure so long as hostilities were continued by a partner, unless the victor consented to abrogate his rights. Accordingly, the two structures, which were seized on May 10, two days after the unconditional surrender, were validly seized in prize. The appeal was dismissed.

CURRENT PERIODICAL LITERATURE

By K. W. B. MIDDLETON, B.A., LL.B., Advocate

THE MACHINERY OF JUSTICE

It is odd that in this country, alone among all the Western democracies, there is neither a Minister of Justice nor any Minister occupying the same position under another name, though it is not the only odd thing about this country. The question has been ventilated from time to time for more than a hundred years, but nothing has been done, or at least there has been no radical change, in spite of powerful advocacy, especially by the Machinery of Government Committee, under the chairmanship of Lord Haldane, which reported unanimously in 1918 in favour of establishing a Ministry of Justice. Either the practical arguments for making the change have not been strong enough, or the forces and interests against it have been too strong.

It is true that in England the Lord Chancellor performs many of the functions of a Minister of Justice, with the main exception of the administration of the criminal law, and even in that field he appoints and removes Justices of the Peace, who, of course, in England do most of the summary criminal work. But the duties of the Lord Chancellor are too multifarious to enable him to give more than part of his time to administration. " When he has sat from ten-thirty to four o'clock as President [of the House of Lords] doing judicial business he returns to his room. He changes the black trousers, in which he has exercised his judicial function, for knee breeches, silk stockings and buckled shoes and, still wearing the great wig which has been on his head all the morning, he resumes his seat on the Woolsack as President of that House discharging its legislative function."[1] It might be imagined that he would have little time left for anything else, as indeed would be the case if this were a daily performance. But in fact the Lord Chancellor is also a Cabinet Minister, the chief legal adviser of the Crown, President of the Supreme Court of Judicature, and has a great legal and ecclesiastical patronage. In order to make quite sure he is not idle, every lunatic is entitled by statute to write to the Lord Chancellor whenever he wishes, and to be supplied with paper and ink for the purpose. " Many of them exercise this privilege, some of them every day, and a vast postbag reaches the Lord Chancellor's office every morning."[2]

The Home Secretary also performs certain of the functions of a Minister of Justice. He appoints stipendiary and metropolitan magistrates and the Director of Public Prosecutions, who works, however, under the supervision of the Attorney-General. The punishment of crime comes directly or indirectly within his sphere, and he exercises the royal prerogative of mercy and has powers over aliens and a number of miscellaneous duties that a Minister of Justice, if there were such a person, might perform.

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[1] Lord Schuster, " The Office of Lord Chancellor," 10 *Cambridge Law Journal*, at p. 176.

[2] Lord Schuster, at p. 186.

That the system is extremely untidy, anomalous and in some ways inconvenient can scarcely be denied. But there are no doubt advantages too, which explain why a fundamental reform has always been rejected in the past and probably has only a slight chance of being carried through in the near future. The prestige of the office of Lord Chancellor and the fact that he is removed from the rough-and-tumble of the House of Commons render him less subject to ordinary political pressure than would be a Minister of Justice with a seat in the House of Commons. At the same time his judicial duties bring him into constant touch with other judges and with members of the Bar. Thus he cannot help being sensitive to informed professional opinion and has also opportunities of being personally acquainted with aspirants to judicial office. It is noteworthy that the Machinery of Government Committee, while recommending a separate Ministry of Justice, proposed that judicial appointments of all kinds should remain in the hands of the Lord Chancellor.

The Lord Chancellor, not being head of a large Department of State with too many routine matters to occupy his attention, probably has in some respects a better chance to carry through legal reforms, if he is so inclined, than a Minister of Justice would have. At any rate, reforming Lord Chancellors like Lord Birkenhead and more recently Lord Jowitt, have managed to effect important changes in the law. But perhaps too much depends on the particular occupant of the office, and clearly there is no room for complacency on the subject of law reform. Even when the question is non-controversial and the need for change is evident it is often a very long time indeed before anything is done about it. " Judges had pointed out since the turn of the century," writes Mr. Gerald Gardiner, Q.C., in the *Law Quarterly Review* for January, 1953, " that the doctrine of common employment was out of accord with modern economic and industrial conditions, but its abolition had to wait until 1948. Although the Law Reform (Contributory Negligence) Act, 1945, was only passed seven years ago, few can today understand how it was that the grave injustices of the old law remained for so long without steps being taken to obviate them."[3]

Mr. Gardiner goes on to enumerate a large number of proposals for reform of substantive and procedural law which have been put forward recently by lawyers of distinction. His purpose in writing is " to draw attention to the increasing demand for the creation of a Ministry of Justice in order that the machinery of law reform may be improved," and to suggest that in view of the cogent arguments against a Ministry of Justice it would be unfortunate if the disinclination of lawyers to consider an alternative remedy for the inadequacy of the machinery of law reform were to result in the demand for a Ministry of Justice becoming too strong to be resisted. After mentioning plans put forward by Dr. A. L. Goodhart, Lord Schuster and others, Mr. Gardiner proposes that a Minister should be appointed from the members of the House of Commons to be called the

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[3] 69 L.Q.R. at p. 50.

Vice-Chancellor and to be responsible to the Lord Chancellor for law reform, with a permanent secretary and sufficient staff to enable him adequately to discharge his duties.

Whether or not such a plan facilitated reforms in the law, it would probably lead to an extension of parliamentary control over the Lord Chancellor's office, and might sooner or later result in that systematic review of the whole administration of justice which Lord Haldane thought necessary.

So far as Scotland is concerned, the administration of justice is in a tidier state than in England, but not therefore immune from criticism. There is again a division of functions between the Secretary of State and the Lord Advocate, but the Secretary of State is in a relatively far stronger position than is the Home Secretary in England, the powers and status of the Lord Advocate being akin to those of the Attorney-General. It is not surprising in the circumstances that the cause of law reform in Scotland is largely dependent on what happens in England. Where, as in the case of the liability of the Crown, or the law of common employment, or of contributory negligence, the rules in the two countries are similar, it has been possible to alter the law in both simultaneously. Otherwise it has proved difficult to secure changes in Scots law and legal procedure, although perhaps not so many changes are needed as in England. The Secretary of State, who is not normally a lawyer and has a great many other subjects to worry him, cannot be expected to venture into this large and thorny field if he can help it. Thus it is 25 years since there has been a comprehensive examination of the practice and procedure of the Court of Session and twice as long since the working of the Sheriff Court has been considered. In England, on the other hand, there has been in recent years an almost continuous series of procedural inquiries. Thus in 1933 there was a Business of the Courts Committee, and from 1934 to 1936 a Royal Commission on the Dispatch of Business at Common Law. In 1947 the Evershed Committee on Supreme Court Practice and Procedure was appointed, and interim reports were issued in 1947 and 1949. This committee is still sitting. These inquiries, and others, have not been fruitless and, indeed, a great deal of legal reform has been effected in England, although less than might have been effected even without raising controversial issues. English lawyers perhaps do not sufficiently appreciate their good fortune in having a Lord Chancellor at hand to look after their interests and those of the law.

It has been argued that sound constitutional practice requires that responsible Ministers of State should be free from professional bias, and that a Minister charged with the administration of justice ought to view matters concerning the legal profession with the same detachment of feeling and outlook as a Minister of Health when considering questions affecting the medical profession.[4] But this theory, which no doubt has something to be said for it, overlooks the inseparable connection between law and politics. Governments are necessarily dependent on legal advice whenever legislation is proposed, and the danger that legal advisers will be subject to professional bias has to be weighed against the risk that they will be too much detached from professional opinion and lack professional skill. Doctors are not always the most competent medical administrators. Legal administration, however, is a subject that laymen can hardly master, or even fully understand. Home Secretaries and Secretaries for Scotland have sometimes been lawyers, and it may be suggested that, to put it no higher, their professional training and outlook have not been a disadvantage to them in so far as they have been concerned with the administration of justice. To take one example, if the appointment of the original members of the Scottish Land Court had been in the hands of a professional, and not a lay, Secretary for Scotland, it is unlikely that there would have occurred the unfortunate error which resulted in *Mackay and Esslemont* v. *Lord Advocate* (1937 S.C. 860) and the passing of the Scottish Land Court Act, 1938. Can it be supposed that a professional Minister would have allowed an illegal condition to be inserted in the Commissions of members of the Land Court requiring them to retire at the age of 65?

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[4] *The Way to Justice*, by Heber Hart (1941) p. 115.

THE EUROPEAN DEFENCE COMMUNITY

A year ago the treaty setting up a European Defence Community was signed in Paris by six European Governments, those of France, Italy, Germany, Belgium, Holland and Luxembourg. The treaty may not be ratified or come into operation, but in any event its signature was an important event from a political and from a military point of view. The treaty is also of considerable constitutional and legal interest. The scheme of the Defence Community follows the lines of the Coal and Steel Community, formed by the same six countries, which has now begun to operate. Like the Coal and Steel Community it is professedly a supernational, but actually a hybrid organisation, partly supernational and partly international, and the supernational element in it is small. It is endowed with organs parallel to, and in some instances identical, or almost identical, with, those of the Coal and Steel Community, and has a similar purpose, namely, to integrate as closely as possible one key sector of the separate national spheres. There is to be a Board of Commissioners, in place of a High Authority, and likewise a Council of Ministers, an Assembly and a Court of Justice. The Assembly is to be the same as the Assembly of the Coal and Steel Community, except that France, Italy and Germany are to send three more delegates each, and the same Court of Justice is to serve both Communities.

E.D.C. grew out of the proposal to form a European army, and is defined in the treaty of May 27, 1952, as "a Community of supernational character, with common institutions, common armed forces, and a common budget." As in the Coal and Steel scheme, the Assembly will not play a part of much practical importance. The two main institutions are the Board of Commissioners and the Council of Ministers, the former representing the supernational, and the latter the international, element. The Board, which is the executive and administrative organ of the Community, is to be composed of nine persons appointed for six years by agreement between the six governments and chosen for their general competence. They will retire by rotation and may be re-appointed. They are to receive no instructions from any member government and their supernational character is to be respected. At first sight the Board seems to be the twin of the Coal and Steel High Authority. In fact, the resemblance is misleading. The task of the High Authority is on the one hand to establish a common market in coal and steel within the territories of the member States by prohibiting customs tariffs and any other governmental discrimination or interference, and on the other hand to prevent restrictive practices to the disadvantage of consumers by the industries. This is a relatively simple and technical task in comparison with that confronting E.D.C., and the High Authority is granted extensive powers to carry it out, subject to the control exercised by the Council of Ministers.

The Board of Commissioners by way of contrast, as M. Jacques Trempont points out in an article (in French) on the subject of E.D.C. in the *International and Comparative Law Quarterly* for October, 1952,[5] is not an independent organ but an executant merely. "It constitutes, in point of fact, a Central European ministry of defence superimposed on the national ministries in order to supervise and direct them." It is true to say that it resembles a ministry of defence, so far as its functions are concerned. A national ministry of defence, however, has behind it the power of a government. The Board is destitute of such support. There is no supernational government whose policies it will carry out and on whose authority it can rely. Instead there is a Council of Ministers, which is an international body, or, in effect, merely a diplomatic conference of delegates from six separate governments. It is this body, that is to say really the six governments, which is to lay down the policies that the Commissioners are to pursue, and to which decisions of importance are reserved.

The armed forces which are to come under E.D.C. will consist of land and air units, together with naval vessels for coast defence. The land units will be roughly of divisional strength, each unit, or group, being composed of troops of one nationality, and the units will be combined so that formations will be of mixed nationality at a higher, normally army corps, level. Both unit and corps will defend in integrated echelons for logistic support, and there will be an integrated general staff. A similar principle is to be applied to air forces. The treaty is applicable to the European territories only of the member States. No member State may maintain national forces other than those placed at the disposal of E.D.C., with certain exceptions, such as forces for overseas defence or police duty.

The object aimed at, of course, is to fuse the armies of the six countries together as closely as is practicable for short-term purposes, so as to enable the member States to defend themselves more effectively against external aggression, and also so as to prevent them from employing their forces against one another. The second of these motives is at least as fundamental as the first, or rather more so, since the *raison d'être* of the plan was, and is, to give a means of re-arming Germany in such a way as to avoid the dangers to her Western neighbours involved in German re-armament. Armies, however, are the tools of policy, and to try to fuse the armed forces without providing for a single foreign policy is in a sense to put the cart before the horse, or, it might be more appropriate to say, the breech before the muzzle. This consideration has not escaped the authors of the plan, and at present a project for a European Political Community is being studied, in which the Coal and Steel and Defence Communities would both be merged and foreign policies co-ordinated. The treaty setting up E.D.C., indeed, expressly places on the Assembly the duty of preparing the way for a further advance in methods of inter-European organisation. It is possible that if a Political Community came into being the structure of E.D.C. would be radically altered. As things are, there is an air of unreality about some of the provisions of the treaty.

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[5] 1 I. & C.L.Q. at p. 524.

The Community is not properly of a supernational character, or at least only partially, and it is only with qualifications that it can be said to possess common armed forces. The so-called common budget, again, is something less than it sounds. The treaty provides that estimates of all revenues and expenditure of the Community are to be set down in a common budget, which is to be prepared by the Commissioners. But the budget must be unanimously approved by the Council of Ministers, which means that each of the six governments has the right of vetoing the proposals. There is no power of taxation and the income of the Community will be derived from contributions voted by the national parliaments. Each member State will determine how much it will pay. The distribution of expenditure on defence under separate heads will also be controlled by the Council, though in this instance its decisions may be taken by a special majority, in which the votes of the greater members will be weighted. The budgetary provisions are to be carried out, when adopted, by the Commissioners, but it is not clear in what way the Commissioners are to execute them, and in particular how far they may give orders to the national military authorities.

The subject of the relations of E.D.C. with the North Atlantic Treaty Organisation is also involved in some obscurity. E.D.C. forces are to be placed operationally under the North Atlantic Treaty Commander for the E.D.C. territories, and E.D.C. units may be integrated with non-E.D.C. formations or vice versa. Again, the Board is to co-operate with NATO in preparing armament programmes. But difficulty is likely to arise from the fact that not all the members of E.D.C. are also members of NATO. Indeed, the puzzles involved in E.D.C. are very numerous. The purely military problems appear in comparison to be minor to the problems of other sorts, legal, economic and political. There is no doubt that it is the political issues which are likely to determine its fate. These are largely governed by the relation between France and Germany. There is also an external factor of fundamental importance which makes one a little sceptical about the future of E.D.C., at any rate in the form taken in the treaty of last year. The treaty seems to assume that Germany will remain divided as at present. But there is a possibility, if not more than a possibility, that the division of Germany will not last much longer, not merely because the existing state of affairs is against the long-term interests of the Soviet Union and of the West, and of everybody else, but because the reviving diplomatic and economic strength of Germany is quite likely to make it impossible for the ex-conquerors to keep the Germans disunited. Germany, however, can hardly be re-united without agreement or war between the West and the Soviet Union. If it is to be the former, the basis of agreement must surely be the eventual withdrawal of British, French and American as well as Soviet troops from Germany, and German neutrality between East and West. That would, of course, be incompatible with German membership of E.D.C.

Periodicals also received: *The Canadian Bar Review*, *Revista General de Derecho* (Valencia), *Oklahoma Law Review*, *The American Journal of International Law*, *La Justicia* (Mexico), *Documentation Juridique Étrangère* (Brussels), *Revue Internationale de Droit Comparé*, *The Western Political Quarterly*, *New York University Law Review*, *The Medico-Legal Journal*, *The International & Comparative Law Quarterly*, *The Modern Law Review*, *The Law Quarterly Review*, *Textes Législatifs Étrangers* (Brussels), *The McGill Law Journal*, *Boletín de la Biblioteca del Colegio de Abogados de Lima.*

RECENT LITERATURE

Baron David Hume's Lectures: 1786–1822. Vol. III. Edited by G. Campbell H. Paton. Advocate 1952. Edinburgh: The Stair Society.

Once more we are indebted to the industry of Mr. Campbell Paton for his careful editing and preparation for publication of Baron Hume's lectures, of which the third volume falls to be reviewed. The series is not yet complete, and this stimulates the professional curiosity of the reviewer as to how Hume managed to cover so much ground in what was presumably a single year's course in Scots law. The style of composition, moreover, suggests delivery in the grand manner rather than at conversational speed. It is indeed not surprising that certain topics, such as edictal liability, were eventually omitted by Hume from the main corpus of his lectures. Mr. Paton, however, has been diligent in his reconstruction of this material, mainly through scrutiny of the lecture notes of contemporary students. It does great credit to Baron Hume's students and to Mr. Paton that the resurrection is so successful. It is possibly not every professor's discarded lecture material which would enhance his reputation.

In the third volume the learned author concludes his examination of obligations, and begins the investigation of real rights. The topics covered comprise obligations *ex delicto*, *quasi ex delicto*, and *quasi ex contractu*; also property, servitudes and—in an appendix—the contract of insurance.

The learned editor has sought by means of footnotes to make the lectures useful to the present-day practitioner as well as to the scholar, and most certainly he has rendered meritorious service in this respect. Of course, as Lord President Normand (as he then was) pointed out in *Fortington* v. *Kinnaird*, 1942 S.C. 239 at p. 253, these lectures do not enjoy the institutional authority of Hume's Commentaries on the Law of Scotland respecting Crimes, and the very learned author does not appear to have contemplated their publication. There are a number of points whereon the lectures are very helpful for the modern practitioner, and the references which Mr. Paton has supplied for the unreported cases (a very high percentage of the cases mentioned by Hume in his Lectures) deserve particular note and appreciation. It is regrettable, but possibly inevitable, that no complete table of cases nor detailed index is supplied, since—especially to a practitioner—these are today regarded as almost indispensable.

From the viewpoint of the legal historian the phase of Scots law covered by Hume's Lectures is particularly worthy of study, since the main infiltration of English law into Scottish practice was later. Doctrines of *stare decisis* had not emerged in Scottish practice before the division of the Court of Session, and thus decided cases were properly used to illustrate rather than to make the law. (See *The Doctrines of Judicial Precedent in the Law of Scotland*, p. 10 *et seq.*) Other notable changes of legal doctrine or emphasis between Baron

Hume's time and our own are well brought out in the volume under review. For example, the whole treatment of *delict* and *quasi delict* by Baron Hume is very slight compared, *e.g.*, with the very detailed consideration which he gives to thirlage in the chapter on servitudes. Today one of the most familiar forms of litigation is, by contrast, undoubtedly the action for damages for injury caused by negligence. This aspect of the law receives very little attention in Hume's Lectures, and more attention is paid to remedies for personal injury or death in the context of assythment rather than in that of *quasi delict*.

In the context of *delict* again we note considerable variation from the present law of defamation. Hume dwells at some length on defamation and verbal injury—the scope of these concepts being much less clearly defined than today. Indeed, Glegg, in his preface to the first edition of his treatise on Reparation, made it clear that he had excluded much of this earlier (and as he considered obsolete) law on these topics. At p. 160 the learned editor of the volume of lectures under review, in a note to a passage where Hume treats of *convicium*, expresses the view that the doctrine of *convicium—veritas non excusat*—is probably no longer good law in Scotland. He is supported to some extent in this view by Glegg. (The reference to "Glegg 155" incidentally refers to the third, not to the first, edition where the equivalent reference is pp. 102–3. A reference to Cooper on Defamation, p. 110, might also be in point.) On the other hand, Lord Normand when addressing a meeting of the Oxford University Law Society in 1950 is reported to have spoken strongly in favour of the view that *convicium* is still a useful weapon in our legal armoury.

At p. 140, where the doctrine of *convicium* is also relevant, the learned editor in a note excludes from the scope of actionable defamation today "mere ridicule." This seems to be so in slander at least, though there is an *obiter dictum* of Lord Kinnear in *Russell* v. *Stubbs*, 1913 S.C. (H.L.), 14 at p. 19, which was possibly uttered *per incuriam* and with the English definition in mind.

In discussing the *condictio indebiti* at p. 174, Hume discusses briefly whether error in law is sufficient to base an action for repetition, and favours the view that, on the basis of the equitable rule in Roman Law, it does. The learned editor notes that contrary views have been expressed in the House of Lords, and refers to *Gloag on Contract*, 2nd edition, p. 62. The reviewer ventures the suggestion that the *obiter* views excluding error in law as a ground for repetition, expressed by judges in the House of Lords in 1830, failed to take cognizance of the fact that in Scotland there is no dichotomy of law and equity; and that effect might properly be given in a Scottish appeal to an equitable principle which would not have been appropriate in a common law action in England. In England, though the House of Lords may deny to a plaintiff the right to rely on mistake of law as a basis of claim in a common law action, a remedy may be granted where the claim is in equity—*Minister of Health* v. *Simpson* [1951] A.C. 251.

These, then, are a few of the topics which are of importance to practitioner and scholar alike, and there are many more which would merit discussion if space permitted. Mr. Paton deserves well of his legal brethren for the scholarship he has brought to bear for our enlightenment. Rightly or wrongly, the reviewer questions whether, in view of the heavy costs of publication, the editor should not have been given a mandate to select the most important material from the Lectures, and to omit some of the relatively elementary matter on which Hume has little of outstanding novelty or value to say. There can be no question, however, that Mr. Paton and the Stair Society have done a commendable service to Scots law by making these Lectures readily accessible. They contain a great deal of valuable material. What Baron Hume would think of the publication of his lecture notes we cannot say—"mortui non mordent."

T. B. Smith.

The Dark Age of Scottish Legal History, 1350–1650, being the nineteenth Lecture on the David Murray Foundation in the University of Glasgow, by the Right Hon. Lord Cooper, P.C., O.B.E., M.A., LL.D., DR.(h.c.) Paris. 1952. Glasgow University Publications, No. XCII. Jackson & Co., Glasgow.

Among the many notable addresses under the David Murray Foundation since it was established over 20 years ago, the nineteenth lecture delivered by Lord Cooper in November, 1951, will take a prominent place. Some of these addresses have naturally been more interesting than others to the legal profession but there can be no question of the importance and interest to the lawyer of the subject of the Lord President's lecture. And it could not have come at a more timely moment, for the University of Glasgow had a few months previously founded a Lectureship in the History of Scots Law—the first in that subject in any University. There has also been in recent years, due to the work of the Stair Society in which Lord Cooper has taken a leading and notable part, an increasing interest in and realisation of the importance of the legal history of his country.

Within the limits imposed upon him by a somewhat dark and negative subject Lord Cooper in his usual clear and lucid style presented to those who were privileged to hear him a valuable address, which is now made available in printed form to a wider audience. The period covered is one from the close of the era of the Scoto-Norman law, modelled originally on the Anglo-Norman law of Glanville but later diverging from it in many ways, to the fresh start made under Stair's leadership. We lack many records so that much that we would like to investigate must for ever remain hidden from us. Yet, though it was a dark age—marked nevertheless by a twilight period at its beginning and at its end—all was not, as Lord Cooper points out, a loss, for there were developments—Acts of Parliament, for instance, which are still in force and some of which afford a field for study wherein the historian, as Lord Cooper has elsewhere pointed out, can be of assistance to the lawyer. The fault—the weakness—of the age, however, making all due allowance for the troublous times that afflicted the land and the weakness of the Executive, was the lack of a first-class system of judicial organisation —"the persistent policy of confiding the judicial function to an unpaid part-time lay magistracy," or, as Lord Clyde put it, "the inefficiency of an unprofessional judicature." Not that there was any lack, in Lord Cooper's view, of good lawyers—but they were not on the Bench. This weakness, beginning in the courts in the law of procedure, spread into and affected the substantive law with disastrous results, from which it was only rescued by the golden age of Stair.

The book, which fills an important gap in the literature of the history of our law, should be read by everyone interested in the history of the law of their country, and it is specially to be commended to all students in classes of the History of Scots Law.

G. Campbell H. Paton.

The Doctrines of Judicial Precedent in Scots Law. By T. B. Smith, Advocate and Barrister-at-Law, Professor of Scots Law in the University of Aberdeen. 1952. Edinburgh: W. Green & Son, Ltd. 12s. 6d. net.

Professor Smith modestly refers to his new work as an Essay, but it is in reality far more than that. It is a scholarly and valuable account of a juristic phenomenon to which too little attention has been paid by writers on our law. It is indeed true to say that too little attention has of late been paid to too many legal problems in Scotland, a state of matters for which, incidentally, the author offers at least one sound reason. Works such as his and one or two others recently published, however, afford hope that Scottish legal scholarship is not to be exclusively directed to the work, useful as it is, of compiling digests and labouring at new editions.

The author of *The Doctrines of Judicial Precedent in Scots Law* has dealt with his subject concisely yet in a satisfyingly complete manner. It is no fault of his and no criticism that it calls in places for a highly concentrated attention; and indeed a second and third reading could not fail to be rewarding. The chapter on *ratio decidendi*, for example, is devoted, amongst other matters, to a difficult yet essential task of semantics, namely, the meaning of the expression which gives its title to the chapter, a task not made easier by the dubious contributions made to its discharge by distinguished judges. Perhaps in the next edition Professor Smith will, for the weaker brethren, illustrate some of the more difficult ideas in this chapter by additional practical examples.

It is not possible in a short review to do justice to this excellent work. One or two further general remarks indicative of its value must suffice.

The author lays stress on the comparative aspects of the subject in Scots and English law. This is no mere display of learning, since the part played by the House of Lords in our judicial hierarchy is of very great importance and, as is well known, the subject has had a different history in England. It is interesting as well as promising to find in these pages endorsement of the statement by Bell (of the Dictionary) that the acceptance of judicial decision as a source of law in Scotland was not universal well into the nineteenth century. Perhaps even more interesting is the suggestion that the future may see a reaffirmation of Scottish allegiance to principle rather than blind obedience to precedent, and the alignment of Scots law with the continental and American tendency to test the reliability of a precedent by its relevance to contemporary social life.

Another remark that must be made is that this work, scholarly as it is, cannot be overlooked by the practising lawyer. Can any advocate afford to overlook in future the techniques of "distinguishing," "not following," "doubting," "reconsidering" and so on? Surely not. These can be severely practical questions.

Professor Smith is to be congratulated on a first-rate piece of work whose solid worth is enhanced by a tone of light irony and also, in places, by apposite references chosen from a wider field than law.

A. D. Gibb.

Gloag and Henderson's Introduction to the Law of Scotland. Fifth Edition. By A. D. Gibb, Q.C., Professor of Law in the University of Glasgow, and N. M. L. Walker, Sheriff-Substitute of Lanarkshire. 1952. Edinburgh: W. Green & Son, Ltd. Price £3 3s. net.

Gloag and Henderson is not only a students' textbook but a practitioner's standby and there is assured a warm welcome for this new edition. Since the last edition in 1946 both legislature and courts have been far from idle and it has been no small task to make the necessary revision of this classic. The editors have striven manfully to cope with these difficulties and have succeeded in incorporating successfully large numbers of recent decisions and other new law.

To begin with they have added to the introductory note on the citation of cases reference to some other and newer or more specialised series. It might, however, have been further advantageous to mention the former style of citing T. L. R., *e.g.* (1949) 65 T.L.R. —, and among the special series R. P. C. should be included, as there are references thereto in a later chapter. It would probably also be advantageous to mention there that a full list of the confusing older English series such as B. & B., B. & P., or B. & S., M. & G., M. & M., M. & W., and so on can be found in volume 1 of the *Encyclopaedia of the Laws of Scotland.* The editors might also perhaps consider adding a similar note on the citation of statutes, with a reference to the Statutes Revised, the Index to the Statutes, the S. R. & O.'s Revised, and the Guide to Government Orders.

Turning to the body of the book, this edition runs to some 20 pages more than the last, though in less bulk owing to thinner paper. The only chapter-change is the substitution of National Insurance (Industrial Injuries) for Workmen's Compensation, but many chapters bear evidence of extensive internal changes in consequence of changes in the law, such as those on Carriage by Air, Reparation, Husband and Wife, and Criminal Law.

Bearing in mind that this is primarily a student's book it is not fair to complain of omissions in the notes for the fullness of citation desiderated in a practitioner's book has never been attempted. Yet while the editors have included many recent decisions a few which seem to deserve the student's attention have escaped them. Such are *Victoria Laundry* v. *Newman* [1949] 2 K.B. 528 (at p. 128); *Scottish Insurance Corpn.* v. *Wilsons and Clyde*, 1949 S.C.(H.L.) 90 (at p. 261); *McDouall* v. *MacLeod*, 1949 S.C. 593 (at p. 375, though it is cited on p. 125); *Cutler* v. *Wandsworth Stadium* [1949] A.C. 398 (at p. 389), and possibly *Nance* v. *British Columbia Electric Ry.* [1951] A.C. 601 (at p. 414). Room might also have been found (at p. 484) for a mention of the Coal Mining (Subsidence) Act, 1950, while the Poor Law Act referred to at p. 608 was repealed in 1948. What, too, of the Acquisition of *Law* (Authorisation Procedure) Act mentioned on p. 471, n. 1?

On the credit side of the account, however, is a great mass of revised material, and a host of references to modern cases and recent statutes. On contributory negligence the editors wisely give the old and the new law without committing themselves to any view of the precise effect of the 1945 Act. Again the changes effected by the demise of common employment are very concisely put: the chapter on Carriage by Land takes brief but adequate account of the changes effected by the Transport Act, the chapter on Companies of the passing of the 1948 Act and that on Leases of the Agricultural Holdings Act, 1949.

The new *Gloag and Henderson* may then be thoroughly accepted as maintaining fully the high standard of previous editions in a time when the pace of change tends to outstrip editorial capacity. Not least to be commended are typography, paper and binding much in advance of earlier editions, resulting in a very handsome volume of great importance and value to everyone who has to do with the law of Scotland.

D. M. WALKER.

Fraser's Rent and House-Letting Acts in Scotland. Second Edition by R. A. BENNETT, Advocate. 1952. Edinburgh: W. Green & Son, Ltd. Price £2 net.

The editor of a textbook is not expected to rewrite it, a task which would involve reading all the cases over again. He does enough if he gives references to new legislation and new decisions and alters the text where necessary. Mr. Bennett has followed this method, and accordingly the general arrangement of the book remains the same.

Mr. Fraser did not altogether succeed in his aim of "giving as concise an exposition of the law in as logical a sequence as the complexities of the Acts permitted." The book rather tends to be a series of propositions grouped under headings. Anyone, for example, who tried to read it through would be little wiser at the end of Chapter 1 if he did not know a good deal about the subject already. Sometimes the grouping is not happy. In the part dealing with sub-tenancies there is a paragraph headed "Lodgers," but it contains information which has no connection with sub-tenancies. One result of this is a certain amount of repetition. The book also suffers from a lack of emphasis. No stress, for example, is laid on the change of phraseology in the 1933 Act with regard to alternative accommodation.

However, few people wish to read through a systematic treatise on rent restriction. What is really required is a means of quick reference to the statutory provisions and decisions with comments. Mr. Bennett has certainly given that, though a fuller index would have been desirable.

Even the limited task of the editor was enormous. Of the 32 cases on the first page of the Table of Cases 15 are new. But while references to the new cases are given in the footnotes and some alterations made in the text, the editor has not always appreciated their full effect. An outstanding example is the decision of the Court of Appeal of Northern Ireland in *Enniskillen U. D. C.* v. *Bartlett* [1947] N.I. 177.

Since nothing is said to the contrary the editor presumably accepts this as a correct decision. If so, it called for alteration of the text to indicate the true relationship between section 5 (5) and section 15 (3) of the 1920 Act (pp. 17 and 18), the proper construction of the word "tenant" in section 3 (1) and the First Schedule of the 1933 Act (Chapter 6), the real ground of decision in *Dalrymple's Trustees* v. *Brown* (p. 18) and the bearing of the decision in *Lord Hylton* v. *Heal* (pp. 113 and 186). The statement as to the meaning of "lawfully sublet" (p. 19) is contradicted by the Court of Appeal.

If this criticism is correct, it shews two things. First, the subject is so vast that even with the greatest care a slip is possible. Second, the practitioner is bound to be at a loss without an up-to-date manual. He must know where to find the latest relevant dicta, and that is where this new edition is indispensable.

N. M. L. WALKER.

The Parliament House Book, 1952–1953. Edinburgh: W. Green & Son, Ltd. Price £3 net.

Once again the publishers of the *Parliament House Book* and its Editor are to be congratulated on their enterprise and initiative in making further substantial improvements to what is probably the most widely used work of reference among Scottish lawyers.

The volume of legislation in recent years has inevitably been reflected in the increasing size of the *Parliament House Book*. The result has been that a publication which began its life in the 1820's, as a slim and elegant volume, one may surmise, has increasingly taken on the rotund and cumbersome appearance of middle age. This year, however, in its 128th edition, our old friend has undergone a metamorphosis. Instead of the one volume of inordinate width we have two volumes of convenient size. Each volume has its contents noted in bold letters on the spine and swift reference is also facilitated by the provision of tab index cards and indices at the beginning of each division. These keys enable one to turn very quickly to any part of the *Parliament House Book* to which one has occasion to refer. There is no general index but the aids to reference already mentioned render such an index unnecessary.

The new material published in this edition of the *Parliament House Book* includes the Table of Fees for Conveyancing and General Business which came into operation on October 1, 1952, but which was not available for publication in the previous edition.

The busy practitioner should be more than grateful to those whose labour and ingenuity have produced a *Parliament House Book* which should prove even more useful than its predecessors and which should save him no little amount of time and trouble.

D. W. R. Brand.

G. Del Vecchio, Justice, translated by Lady Guthrie, edited with additional notes by A. H. Campbell: Edinburgh University Publications, History, Philosophy and Economics No. 1. 1952. Edinburgh: University Press. Price 30s. net.

Giorgio Del Vecchio is one of the greatest exponents of modern jurisprudence. More precisely, he is a leader of that wing which aims at the creation of a new legal philosophy based on a critical analysis of human consciousness, and at the same time satisfying the yearning for a concept of justice that transcends the positive law. His writings are chiefly concerned with this fundamental problem. In addition he has devoted particular attention to the relation between the State and law on the one hand and the State and morality on the other.

The treatise under review contains the essence of his doctrine regarding the nature of justice. In its original form it was an address delivered before the University of Rome, and each chapter still consists of main text, presenting the argument, lucid and eminently readable, and documentation, where details are gone into and the history of the various ideas is outlined. No doubt this division has greatly contributed to the popularity of the book. It has gone through four editions in Italian and two in German; and it has also appeared in French, Spanish, Portuguese, Rumanian and Bulgarian.

Lady Guthrie deserves the gratitude of English-speaking students of jurisprudence for providing an admirable translation of this classic, and Professor Campbell for writing a most helpful introduction and editing and annotating the work. His notes are not the least valuable part of this edition. He draws attention to problematic points; he explains those passages which, owing to the continental outlook of Del Vecchio, might puzzle a British reader; and he adds references to Scots law and English law as well as to literature in the English language.

In two appendices, which did not form part of the original address, Del Vecchio inquires into the legal and moral basis of punishment and suggests far-reaching reforms. He is deeply conscious that responsibility for a crime rests not only on the offender but also on society as a whole. He might have mentioned adumbrations of his theory in antiquity. (One is almost relieved he does not, for he is so immensely learned that he tends to be a little hard on other scholars when they fail to quote their predecessors.) The Romans distinguished between causes for a crime springing from a man's nature, *natura*—his physique, his moral attitude, his emotions and so on—and causes springing from his position in life, *fortuna*—his resources, his connections, his office and so on. Moreover, they knew that it was easier for a legislator to tackle the latter class. When, in the early Principate, Macedo, a *filiusfamilias* who had borrowed large sums from moneylenders and was hard pressed by them, murdered his father, the Senate stepped in against such loans. The Senate was aware that it could do little to influence the *natura* of a person, but at least it could eliminate one cause for parricide which belonged to *fortuna*: dealings with usurers. The decree opened with the words (Dig. 14.6.1pr.): "Whereas Macedo, to the other causes for his crime which his nature furnished him, added also debts."

It may be confidently expected that this work, with its rare combination of profound scholarship, genuine humanity and elegance of style, will exercise a wide appeal in this country.

David Daube.

The Law of Income Tax. Twelfth Edition. By E. M. Konstam, Q.C. 1952. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. Price £4 10s. net.

"*Current Law*" *Income Tax Acts Service* ["*CLITAS*"]. Editor-in-Chief, Miss H. G. S. Plunkett, Barrister-at-Law (formerly one of H.M. Inspectors of Taxes); Consulting Editor for Scots Law, Mr. H. A. Shewan, O.B.E., Q.C. With Release 1, The Finance Bill, 1952, Annotated, March 27. 1952. Edinburgh: W. Green & Son, Ltd. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. Price £3 10s. net; Service for 1952, 30s. net.

It is common form to deplore the length and to criticise the complexities of the Income Tax Acts. The new consolidating Act, The Income Tax Act, 1952, does little to satisfy the critics. It does no more than consolidate and thus make available in one Act the provisions relating to Income Tax contained in the Income Tax Act, 1918, and some fifty subsequent Acts. All the ambiguities and obscurities of the repealed Acts are preserved in its 532 Sections, and 25 Schedules.

It is however difficult to see how a Taxing Act can be either brief or shorn of complexities so long as the rate of tax remains high. A high rate of tax moves Parliament to make elaborate provisions to alleviate the burden on particular groups and, at the same time, to close loopholes through which the hard-pressed taxpayer may seek to squeeze.

The authors and publishers of *Konstam* and *Clitas* seek to provide a guide through the labyrinth. The volumes are independent but are designed to be used together.

Judge Konstam's work, of which this is the twelfth edition, is so well known to all who have to deal professionally with Income Tax matters that it is almost unnecessary to comment upon it. It provides, in so far as is possible, a plan of the labyrinth and a commentary on the individual sections and the relevant case law. The work is now published in one volume; the text of the Acts, which occupied the second volume in previous editions, being omitted.

Clitas provides the text of the 1952 Act as amended by the Finance Act, 1952. But it does much else. It provides, in an addendum to each section of the Act, a note of the origins of the section, a cross reference to related sections, a short commentary and a reference to the relevant passage in *Konstam*.

It also includes the text of the unrepealed and saved provisions of earlier Acts, and, most valuable, the text of the Regulations governing Double Taxation Relief, some of which are otherwise difficult to discover.

The text of the Finance Bill and the Financial Resolutions are included. This section has a limited appeal but is valuable to taxpayers and their associations who desire to know what taxation provisions are pending, so that they may make representations for the modification of such clauses in the Bill as appear to them to be offensive.

The great value of *Clitas* lies in its format and the service provided by the publishers. It is a loose-leaf publication, and the publishers provide a new page so soon as the text of the page provided is superseded by amending legislation or otherwise modified. The user of *Clitas* is thus spared the laborious or neglected task of amending the text originally provided. It is to be hoped that this loose leaf format will be adopted for other legal publications. Nothing is more irritating or more likely to lead to error than a textbook that is not up to date.

Both volumes contain excellent Indices. The Tables of Cases are to be commended particularly, for they contain not only a reference to the Tax Case Reports but to the majority of the other Reports, including the Session Cases and Scots Law Times.

DOUGLAS JOHNSTON.

Pollock's Law of Torts. Fifteenth Edition. By P. A. Landon, M.C., M.A. 1951. London: Stevens & Sons, Ltd. Price £3 3s. net.

This is the second edition of Sir Frederick Pollock's well-known treatise to be edited by Mr. Philip Landon, M.C., M.A., Honorary Bencher of the Inner Temple and Fellow and Tutor, Trinity College, Oxford. Sir Frederick Pollock died in 1937, but the last edition which he himself edited was in 1929 (thirteenth edition). The first re-edited version of his work appeared in 1939. The editor then adopted the commendable practice of printing the original text of Pollock's thirteenth edition unaltered, and of adding his own fresh matter in brackets to differentiate it from the *ipsissima verba* of the author. The authoritative quality of the original text was thus preserved although Devlin J. is reported in a recent case to have sent for the thirteenth edition to discover what Pollock himself had written!

This new fifteenth edition also preserves the original text unaltered, and confines itself to adding some fresh matter in brackets. It is surprising how little has required to be inserted since the thirteenth edition and how few brackets there are to disturb the reader's eye. Mostly, the additions concern statutory changes in the law: the Law Reform (Miscellaneous Provisions) Act, 1934, the Law Reform (Married Women and Joint Tortfeasors) Act, 1935, the Limitation Act, 1939, the Law Reform (Contributory Negligence) Act, 1945, the Crown Proceedings Act, 1947, and the Law Reform (Personal Injuries) Act, 1948. The chapter on contributory negligence is possibly the least satisfactory, but it is difficult to see how it could be otherwise when endeavouring to preserve the original text in a chapter of law so altered by statute since Pollock wrote. Pollock's observations on "proximate causes" are still of value, but instead of inserting in brackets the recent statutory alterations, the author has here chosen to refer back to an introductory excursus of his own, which does not make for easy reading. There are plentiful notes throughout the book to bring the case law up to date. Some of these are Pollock's own and some the editor's, and in this new edition better steps have been taken to differentiate them. Finally there are separate excursuses of the editor's following Pollock's own example in Maine's *Ancient Law*. The new excursuses are that already mentioned on contributory negligence, another on *Read* v. *Lyons* [1947] A.C. 156, and two addenda to previous excursuses on conspiracy and negligence. The latter, dealing with *Donoghue* v. *Stevenson* 1932 S.C. (H.L.) 31, is of most interest to Scots lawyers, supported as it is by Pollock's own article for the *Law Quarterly Review* reprinted as an appendix. It fully illustrates, moreover, the confusion into which Lord Atkin's "proximity" rule seems to have thrown English principles, a confusion which, following Lord Macmillan and Lord Thankerton, we do not share this side of the Border.

What of Pollock's original text after the passage of twenty-three years? One is immediately struck with the beauty of his style so rare in legal textbooks; some pages read like carefully phrased judgments. As a Scots lawyer one is also gratified to see, in his opening chapters on the nature of Tort and the principles of Liability, how Pollock keeps the civil law consistently in mind as befits the scholar and legal philosopher. For instance we find him considering (p. 13, 15th edition) our civil distinction between *dolus* and *culpa* and writing of the latter branch:

"Culpa is exactly what we mean by 'negligence,' the falling short of that care and circumspection which is due from one man to another. The rules specially dealing with this branch have to define the measure of care which the law prescribes as due in the case in hand. The Roman conception of such rules, as worked out by lawyers of the classical period, is excellently illustrated by the title of the Digest 'ad legem Aquiliam' a storehouse of good sense and good law (for the principles are substantially the same as ours) deserving much more attention at the hands of English lawyers than it has received."

W. A. Elliott.

Palmer's Company Precedents. Sixteenth Edition. By His Honour, A. F. Topham, Q.C., Part Two—Winding-up. 1952. London: Stevens & Sons, Ltd. Price £6 15s. net.

In that part of Company Law which deals with the administrative side of winding-up are to be found material differences between English and Scottish procedure under the Companies Act, 1948. An indication of these differences is that section 365 empowers the Lord Chancellor in England and the Court of Session so far as relates to Scotland to make general rules for their respective spheres.

This admirable volume is essentially concerned with the English side of the picture, and embodies an exposition of the fundamental enactments common to both countries, and the procedure consequent upon sections applicable to England only, under reference to the Companies (Winding-up) Rules, 1949, made by the Lord Chancellor with the concurrence of the Board of Trade, which is statutorily concerned very materially. As a result, the precedents follow English judicial practice, which differs greatly from that current in Scotland.

Nevertheless, much information and many useful hints are given which are of value for guidance on the Scottish side of the Border—care always being taken to ascertain applicability. There are indeed Scottish case law references, although the citations in the main are necessarily based on English decisions. The decisions—whether Scottish or English—are in many cases of common weight, and study of the volume, for this if for no other reason, should be rewarding.

A. C. Bennett.

Handbook of Trade Mark Laws throughout the World. By P. O. Hereward, B.A., Barrister-at-Law. 1951. London: Sweet & Maxwell, Ltd. Price 30s. net.

In this first edition of an essentially practical book the learned author with his collaborating colleague, both drawing on experience in the trade-marks section of the legal department of Imperial Chemical Industries, Ltd., have compiled a digest of the procedure for registration of trade-marks in a comprehensive range of countries and territories. It is in compact form. No attempt is made to deal exhaustively with the law on the subject nor to refer in detail to statutes or other regulations domestic to the countries concerned. The avowed object of the book is to furnish concise answers to those questions which may arise most frequently in the preliminary consideration of registration in all parts of the world and to give the necessary minimum of information to enable an application to be filed in the absence of time to refer to a local expert for detailed advice. Experience alone will show whether this claim is in all points justified. It cannot detract from the merit of the book to suggest the purpose may not always be adequately met unless in the hands of an applicant already at least generally conversant with the practice of trade-mark registration. In the introduction useful general reference is made to international conventions and their application. The text deals in alphabetical order with particular countries and their requirements so far as gleaned by the author and his colleagues in their everyday work. The Iron Curtain is even penetrated to a limited extent as such examples as information for Czechoslovakia and Poland show, although Russia itself is tersely dismissed with the comment that very few find registration there worth while. In certain instances suitable styles of Powers of Attorney with translations are furnished for the purpose of initial applications and subsequent assignments. Great Britain receives substantial attention and forms the basis of reference in the cases of countries where the law is similar through the operation of international convention. To the person who may be confronted with the task of effecting an application as an occasional professional duty, this publication must prove invaluable. It furnishes in concise form the knowledge to enable the necessary instructions to be promptly given for the purpose of placing the essential information and authority in the hands of an expert local agent.

Andrew C. Bennett.

Share Transfer and Registration in Company Law and Practice. By A. K. Martin, F.C.I.S. 1951. London: Stevens & Sons, Ltd. Price 35s. net.

This book provides a clear description of the practical work of an English company's share registration department. Examples of books and forms are shown but it is unfortunate that this section does not include a specimen allotment letter. Apart from the lack of detailed information about new capital issues, all aspects of a company registrar's duties are explained most fully.

The author describes the certification and registration of transfers, the preparation of share certificates, share warrants, and debentures, and the payment of dividends. All the returns which are required by the Registrar of Companies are explained and there is a chapter on the Exchange Control regulations in relation to transfers and dividends. The appropriate sections of the Companies Act, 1948, are effectively summarised and several leading cases are mentioned.

The usefulness of this book is much restricted in Scotland by the absence of any reference to Scots company law—the principal differences from English law being the registration of trustees as such, and the acceptability of documents if signed by a majority and quorum of trustees.

Charles A. Scott.

Russell on Arbitration. Fifteenth Edition. By T. A. Blanco White, Barrister-at-Law. 1952. London: Stevens and Sons, Ltd. Price £3 10s. net.

Russell is now over one hundred years old and in its fifteenth edition; that it is an established authority is now quite beyond doubt. Although little more than two years have passed since the last edition, this new edition is of more than ordinary importance. The Arbitration Act of 1950 consolidated the law of England on the topic which had been previously contained in Acts of 1889 and 1934. Scotland, it may be noted, is still making do with the common law and an Act of 1894. But while this new Act prompted a fresh edition of *Russell* the learned editor has taken the opportunity to give the book a fundamental revision. For the first time since the seventh edition of 1891 the book has been recast into chapters dealing with logical divisions of subject-matter and the plan of the editions since the seventh in giving a lengthy commentary on the Acts has been abandoned. The whole format has been changed, references have been shifted from the body of the text to the footnotes, and the new arrangement is conspicuously more coherent than the old.

The editorial pruning-knife has also trimmed off much of the superfluous growth of comment in the last few editions and many of the older cases have been deleted as changes not only in law but in social and economic circumstances have deprived them of interest or authority. This edition is accordingly some hundred pages shorter than the last one, a commendable achievement.

While *Russell* is an English book and the law of Scotland on this matter is not identical, Part II of the 1950 Act (relating to foreign awards) applies to Scotland and to that extent the book is a direct authority for the Scots lawyer. But *Russell* also cites a considerable number of Scottish cases and discusses many matters of general application which are not dependent on the 1950 Act or any specialty of English law or procedure. Consider, for example, the interpretation of phrases such as " all disputes arising out of the contract," or such general questions as partiality or misconduct of the arbitrator. These and many more questions are fully treated in *Russell*. Examination indicates that all the essential cases have been retained in this revision and the new ones down to the latter part of 1951 included. The general impression leaves no doubt that the substantial editorial changes have been justified and the effect in sundering discussion from too close connection with a section of the Act will probably enhance the value of *Russell* to the Scots lawyer, so long as he does not use it blindly but judiciously and remains alert for the material differences which do exist in many branches of the law.

D. M. WALKER.

Terrell and Shelley on Patents. Ninth Edition. By K. E. Shelley, K.C. 1951. London : Sweet & Maxwell, Ltd. Price £5 5s. net.

The law of patents is not a native growth in Scots law and so late as 1751 Bankton still doubted the validity of exclusive privileges granted to private individuals in matters of manufacture. In fact the Act of Union had legalised in Scotland the English Statute of Monopolies of 1623 from which Act the patent law of both countries stems. Today it is only in procedural matters that there is discrepancy: in substantive law there is no difference and the dearth of Scottish patent litigation results in constant reference to English authority.

The year 1949 gave us a new Patents Act consolidating the law and new Patents Rules bringing the procedure up to date. In consequence of these, the material changes introduced by the Act, and the numerous decisions in the 18 years which have elapsed since the last edition, a revised edition of *Terrell*, long the standard textbook, had become essential. There is ample evidence that the necessary work of revision has been carefully done in this edition by the learned editor. He has taken the opportunity to rearrange much of the material of the book so that the addition of his own name to the title-page is quite justified.

The principal changes made by the 1949 Act are summarised on pp. xi—xii, and these are followed by comparative tables of the 1949 and prior Patents Acts. The appendices contain not only the 1949 Act and Rules but the prior Acts, so far as unrepealed, and parts of other statutes which bear incidentally on the topic such as the Crown

Proceedings Act and the Atomic Energy Act. Notwithstanding this compendium the new edition is slightly shorter than the last.

There is no doubt that the new material and the recent decisions have been skilfully worked in and the completeness and accuracy of the work will remain unassailed. Unfortunately the historical points made in the review of the last edition at 51 L.Q.R. 720 have not been attended to, and the Statute of Monopolies still appears throughout as of the year 1628. It is also a pity that the modern practice of giving the date with all citations has not been followed. On the other hand statutory references are given by their short titles which is an advantage as few can remember their statutes by the regnal year. The Scottish lawyer should also bear in mind that a few of the Scottish cases which have not entered R.P.C. are not cited and and at p. xlv *Montgomerie* v. *Paterson* should be (C.S.) and not (C.A.). Our only regret is that *Terrell and Shelley* cannot adopt from Blanco White's *Patents for Inventions* the gems of judicial humour to be found in R.P.C and set at the head of the latter's chapters. But in no quality of accuracy and completeness does the new *Terrell and Shelley* fall behind and this edition will maintain its authority as the leading textbook.

D. M. Walker.

The Court and the Constitution. The Oliver Wendell Holmes Lectures 1951. By Owen J. Roberts. 1951. Harvard University Press. London : Geoffrey Cumberlege. Price 12s. 6d. net.

This book contains the three lectures delivered at Harvard as the Oliver Wendell Holmes Lectures for 1951. The distinguished lecturer was from 1930 to 1945 an Associate Justice of the Supreme Court of the United States and has since 1948 been Dean of the University of Pennsylvania Law School, thus illustrating once again the happy readiness of transition possible in America between practical judicial experience and legal teaching. In the three lectures Dean Roberts discusses the process of judicial interpretation of conflicts arising between federal and state allegiance in three important spheres, namely taxation, regulation of trade or the police power, and "due process of law." It is well known how since Chief Justice Marshall's pronouncement in *Marbury* v. *Madison* in 1803 at least the United States Supreme Court has exercised the function of determining the constitutionality of legislation. It is possibly not so well known in this country how the dual sovereignty of state and federal power has repeatedly clashed and the theme of these lectures is how, in the solution of these conflicts, the Supreme Court has exercised a vital influence.

The conclusion reached by the learned lecturer and fully substantiated by the authority he cites is briefly that the trend of decisions of the Supreme Court has furthered the development of centralisation and the broadening of federal over state power. This corresponds very closely to the very different conditions of Britain where, though by quite a different process, more and more matters are falling within the sway of national rather than local control. The fundamental reasons in both cases would appear to be the same, the movement towards nation-wide uniformity and equality and control in the national interest, due in part to the drive towards improved conditions of life and labour, secured and enforced largely by national legislation, and in part to the scale of projects undertaken or prompted by the central legislature and necessitated by the threat or actuality of war. In taxation Dean Roberts finds a steady progress towards the abolition of the reciprocal immunities formerly enjoyed by federal and state property from the other's taxation, in regulation of commerce a steady trend to uniform standards for what has expanded to become in effect a unified rather than a state economy, while in the sphere of due process the Supreme Court has exercised enormous power over the legislation, courts and executives of the states, probably quite unintended by the framers of the constitution. At least the first two of these developments Dean Roberts sees as beneficial, but it remains evident that the ways in which the Court has interpreted the express grants of power to Congress have more and more circumscribed the pristine powers of the states which were intended to be reserved to them by the Constitution. These lectures are thus a useful contribution to our knowledge of the trends actually operating on the American Constitution.

D. M. Walker.

The Sale of Goods. By Clive M. Schmitthoff, LL.M.(Lond.), LL.D. (Berl.), Barrister-at-Law. 1951. London: Stevens & Sons, Ltd. Price 35s. net.

This work is intended to be neither a treatise on sale, nor a commentary on the Sale of Goods Act, but a practical study of the sale of goods. It is the first of a new series of such studies in business law and administration, the aim of which is to replace the unduly formal approach of recent years by a functional approach, and to "relate legal problems pertaining to business matters to their economic and social environment," and to include in the province of business law "the law-creating practice of professionally trained business administrators." To what extent the study and practice of the law is at the present time out of touch with life it is difficult to say; but history shows that law does tend to become an end in itself, and does require periodically to be reduced to its proper status of a means for ensuring justice in human relationships; and, accordingly, every effort to present our law as an up-to-date part of the essential machinery of our modern civilisation is effort well directed.

Those for whom the work is designed include lawyers, businessmen, and students, and the varied requirements of these three groups have determined the manner of presentation. The introduction consists of a historical survey of the law of sale of goods, and a short statement of the general principles of that law. The survey is a masterpiece of accurate scholarship, thorough and succinct, and will be read with pleasure and profit by all. The statement of principles is designed for the use of beginners, and will give them, at the start of their journey, a most useful picture of the country through which they are to travel. The introduction is followed by a systematic exposition of the codifying Act, sections and groups of sections being explained and illustrated in a simple and clear manner, the effectiveness of the method of presentment being increased by sub-division into paragraphs distinguished by headings in heavy type which facilitates reference: and appended are four related Acts, each preceded by useful notes explaining their purpose, scope and main features: while a well laid-out index makes all the contents of the volume readily accessible.

Topics of special interest today, for example, export sales, price control and purchase tax, are commented on and explained; and the international character of the rules governing the sale of goods is emphasised and illustrated throughout the work. Scots law is given a distinctive place, the provisions of the Code relative to Scotland receiving due consideration, recent decisions of the Court of Session and Sheriff Court cited, and reference made to Professor James Mackintosh's classic work, the Roman Law of Sale.

In the regulation of mercantile affairs, mercantile practice must be taken into account, but it must also be referred to well-established principles of mercantile law. It was not by accident that Lord Mansfield, while maintaining close contact with the mercantile practice of his day, based his judgments on the Digest, the laws of Oleron, and the writings of the jurists, Molloy and Malines. The co-ordination of legal theory and business practice, and the ultimate transformation of practice into law, can be effected only by the courts and the legislature; but the learned author does well to stress the need for this co-ordination, and he has succeeded in a remarkable degree in meeting the requirements of those for whom he writes, for the lawyer will find in this work either the answer to his problem or an excellent starting-point for research, the business-man will have ready access to the working rules which he requires in this "the most common business transaction," and the student, whether of law or of commerce, will acquire a knowledge of the basic principles of the law of sale, and an enthusiastic interest in their further development.

David Maxwell.

Loyalty and Legislative Action. A Survey of Activity by the New York State Legislature, 1919–1949. By Lawrence H. Chamberlain. 1951. Cornell University Press: London, Geoffrey Cumberlege. Price 25s. net.

This volume is one of a series of studies of the impact on civil liberties of current American governmental programmes designed to ensure internal security and to discover and control disloyal or subversive conduct and covering the work of federal and state "un-American" activities. This particular volume recounts 30 years of legislative control of subversive activity in New York State. In view of the conflict in a democracy between freedom and licensed treason and the dangers of an alternation between witch-hunts and pogroms on the one hand and uninhibited spying and subversion on the other, the subject is one of compelling interest. Britain has not yet been touched by this trouble to a serious degree, but the nice balancing of state security and individual liberty is a difficult problem of democracy.

The tale begins with the Lusk investigation of 1919-20 when a committee of the New York Legislature conducted an active investigation into " Red " propaganda, characterised by gross abuse of legal procedure, misrepresentation, victimisation, and executive and judicial collusion to defy the law and the principles of justice. This resulted in a report of 4,000 irrelevant pages and two laws requiring conformity of opinion by teachers and licensing of schools though these were repealed in 1923.

This was followed in the years before the Second World War by statutory insistence on oaths of loyalty by teachers, and in 1940–41 by the Rapp-Coudert investigation into subversive activities in schools. This was conducted with reasonable regard for justice and individual rights but proceeded on a confused notion of subversion. Following on this the New York Board of Higher Education took proceedings and secured the dismissal of a number of teachers, though there was a general avoidance of reckless accusation. The Board, however, failed not so much in judicial procedure as in accepting without inquiry the Coudert Committee's conception of subversion. Then in 1949 despite opposition the Feinberg law was passed to block loopholes disclosed by the trials of the teachers and to " eliminate subversive persons from the public school system." Attempts to put this into operation were not happy and in 1949 it was challenged in the courts and restrictively interpreted.

The conclusions reached by the learned author are valuable and well justified by his narrative, but they are disturbing and disclose grave failings in the democratic system. The best of the legislative investigations was marred by proceeding on challengeable assumptions, by producing unnecessary hardship to individuals and by violating principles of civil liberty and academic freedom. The author's suggested procedural safeguards apply particularly to the American technique of the legislative inquiry but have considerable relevance for such British counterparts as the Royal Commission and the less elevated Select Committee or public inquiry. The book has also considerable relevance on the difficult questions of measures to counter the Communist fifth-column and it illustrates sharply some of the defects to which democracy is liable. Above all it stresses the necessity at any inquiry of permitting representation of parties, cross-examination, and the other safeguards of ordinary judicial process.

D. M. Walker.

The International Court of Justice. By Oliver J. Lissitzyn. United Nations Studies No. 6. 1951. New York: Carnegie Endowment for International Peace.

This work has a twofold value. Primarily it affords guidance to, and furnishes much knowledge of, the constitution and activities of the International Court of Justice, but it also contains much of interest on the art of pleading. The Court of Session is not the only judicial body whose work is hampered by failure on the part of pleadings to focus correctly and adequately the *de quo quaeritur.*

Mr. Lissitzyn has written, and written well, a monograph described as a study of the role of the I.C.J. in the maintenance of international peace and security. What is the result of some twenty-three years of activity, for the old Permanent Court of International Justice and its successor are treated as one? The author's conclusion is—" not much! " Should this be a cause for pessimism? He does not think so: indeed, he ends on an optimistic note. Why?

The point is well taken that not all disputes thrown up by the body politic are apt for settlement by judicial process. " There always remain some areas of interest . . . in which conflicts are settled only by the matching of economic and political strength " (p. 72). To cull an example from recent Scots cases, who would deny that the *Crofter Harris Tweed Case* was suitable to judicial arbitrament? Of course in international law the areas of interest which are intractable to judicial settlement bulk largely over those which are amenable. This in itself militates against the efficacy of the I.C.J. as an instrument for maintaining peace. But then it is only because the Court is one of International Justice that it is ever suggested that it should maintain peace. No one has ever advocated that the prime task of the Court of Session is the prevention of civil war. It is, of course, true that one consequence of the work of courts well done is that the spectre of revolution remains a spectre. And so with the I.C.J.; it is not even a criminal court. It should not be forgotten that the *Corfu Channel Case* between the United Kingdom and Albania was, in substance, one of reparation.

Once the limited nature and function of the I.C.J. is clearly apprehended, its value can be more justly estimated. Its main task seems to be the excogitating of a standard pattern of behaviour for members of the international community, and the impartial application of the principles subsuming that pattern. If thereby it engenders confidence in its integrity, it will induce resort to international litigation, and consequently greatly strengthen the cause of peace.

This is the message of a work written in a spirit of admirable and refreshing restraint. The insistence on the fact that the I.C.J. is a court of law, and not a piece of political machinery, is timely. Mr. Harriman in Persia, and the I.C.J. at The Hague, have nothing in common, and could not have. The distinction is vital to the value and continuance of the work of the I.C.J.

J. J. Gow.

The Judicial System and the Laws of Ethiopia. By Nathan Marein, Advocate-General to the Imperial Ethiopian Government. Rotterdam: Vurtheim.

The legal system and the law of Ethiopia remain obscure and something of a mystery. But gradually light is being shed by a few of the English-trained lawyers who have been in the service of the Emperor, Haile Selassie, since his restoration to his throne in 1941. Among them, Mr. Nathan Marein, originally an Advocate of Palestine, has an honoured and pre-eminent place. He has been for the whole period an adviser of the Emperor, and more recently Advocate-General of the Government. Last year he published an interesting study of those elementary rules of Private International Law which were applied by the courts in Ethiopia, as it were by necessity; and now he has written a more comprehensive book about the laws of the country and the judicial system. He summarises, or refers to, all the proclamations and decrees and legal notices as well as the laws in the stricter sense which have been issued by the Emperor.

Mr. Marein makes no claim to have written a systematic and scientific treatise. He was concerned rather to provide a practical guide for advocates and judges and for those persons who have commercial interests in the country. And he is fully aware of the difficulties of making exact and precise statements about the law. In the first place, the law is fluid in many points, and in others extremely scanty. Secondly, judicial precedents are not binding, and the judges are prone to give contradictory decisions in the different courts; and lastly, only a limited part of the legislation is available in the English language. Thus, while the criminal law has been published in an English version, the civil law is derived for the most part from a compilation of secular and religious traditions, the Fetha Negust, written in the old classical language of Gheez, and translated hitherto only into Italian. Apart from these ancient texts, the only modern legislation on the civil law is the Law of Loans, published in 1924, which follows provisions of the French Civil Code. Before the Italian occupation, that law was applied only to Ethiopian subjects, and not to foreigners. But in view of the agreement between the Emperor and the British Government in 1942, the Capitulation Treaties are now regarded as abolished, and the law applies to all inhabitants.

The same change has taken place with regard to the criminal Code, which was originally issued in 1930 by the present Emperor. It was then applicable only to native subjects, and foreigners were tried according to the Italian Penal Code. Now, however, the Ethiopian Law, which is amplified by examples drawn from the Bible, has general application. It includes some remarkable general provisions. Thus the judges are directed to use their knowledge and settle a new case, which is not described in the Code, by examining what rule will cover it by interpretation and analogy. "If an entirely new case arises, which cannot be covered in this way, it should be brought and decided by the Chief Court." That article opens the door wide to judicial legislation. Many proclamations indeed have been issued since 1941 to supplement the Code, and a new codification is being prepared.

The Civil Law of personal status is likewise very incomplete. Three forms of marriage are recognised, religious, civil and customary. No divorce can be obtained from a religious marriage, but for the others there may be divorce by consent. Where foreigners are concerned, the court normally grants divorce in accordance with the provisions of the national law of the parties; but in some cases the court has applied the Law of the Domicile. These matters depend largely on the nationality of the foreign judge who sits in the Ethiopian court. If he is British or American, he is likely to apply the principle of domicile; if he is Swedish or belongs to another European country, he will apply the principles of nationality. And his Ethiopian colleagues, who are often innocent of knowledge about Private International Law, may or may not follow his advice.

The Law of Nationality also is incomplete. But it contains some interesting provisions about the nationality of a married woman. A foreign woman marrying an Ethiopian acquires his nationality, but the wife of a naturalised person does not by the act of her husband acquire Ethiopian naturalisation. She must herself apply to the Ministry of Foreign Affairs. The law lays down as conditions of naturalisation residence in Ethiopia for more than five years, ability to support himself and his family, and fluent knowledge of the Amharic language. The author notes, however, that many foreigners have been granted Ethiopian citizenship without possessing any of these qualifications.

The judicial system includes what are in fact Mixed Courts, that is, composed of Ethiopian and foreign judges, without their being so-called. The highest tribunal is the Supreme Imperial Court, composed of three judges. Its President has the fine-sounding name of Afa Negus, meaning the mouth of the Emperor, and it is usual for one of the other two judges to be a non-Ethiopian member of the High Court, who did not sit in the original case. The High Court also is composed of three judges, and it is usual for a presiding judge to be a non-Ethiopian. A proclamation of the Emperor in 1947 created a special Security Court to deal with matters of treason, espionage and similar offences. It was to be composed of nine judges, appointed by the Emperor. At least four of them must be judges of the High Court, and three high army officers. It lays down its own procedure in order to ensure a fair and impartial trial. In fact, however, only one person has been tried by the Security Court. He was a high dignitary of Ethiopia charged as a war criminal, and the court, which included two non-Ethiopian judges of the High Court, sentenced him to death.

The Ethiopian Church still retains a certain jurisdiction apart from the temporal jurisdictions. It has lost indeed its general competence to deal with disputes over landed property of the Church and matters of personal status; but it can deal with members of a religious congregation by way of confession and inflict penalties, and it exercises powers over the clergy. In fact, too, with the consent of the parties it still decides matters such as divorce, separation and dowry of Ethiopians. And it can levy taxes and rates for the maintenance of the Church.

The Commercial Law is very rudimentary. As yet there is no law of bankruptcy or of negotiable instruments, or of copyright, trade marks and patents. A few general provisions in the Penal Code deal with the last matters, and a Law of Societies, enacted in 1933, includes provisions for partnerships and limited companies. The author gives an example of the difficulties which arise for the courts in following any system of Commercial Law in the absence of Ethiopian enactments. A local merchant ordered goods from Kenya through a local commission agent. The goods arrived short, and the merchant brought a case against the commission agent. The High Court, following the opinion of the foreign President, held by a majority that a commission agent was not the principal and could not be held liable. When, however, the case went on appeal to the Supreme Imperial Court, the majority, against the advice of the one foreign judge, reversed the judgment and held that a commission agent is liable for the wrongs of a foreign firm, " because the merchant in Ethiopia could not know that the foreign firm was dishonest."

Foreigners in Ethiopia are under a disability to hold land. They can only obtain that right by special permit of the Emperor. Special authorisation, too, is required for a naturalised citizen to purchase land, and he must give an undertaking that, if he reverts to his previous nationality, he loses the right to hold land. The foreigners in question have hitherto been mainly Italian subjects, and it was natural that the Ethiopian Government should be cautious in allowing them to acquire immovable property. Apart from this one disability, no discrimination may be made in the law against foreigners. The Administration of Justice Proclamation of 1942 prescribes that "no court shall give effect to any existing law which makes inequitable difference between our subjects and foreigners." Foreign religious missions are allowed in Ethiopia, but not in what are defined as Ethiopian Church areas, that is, where the predominant majority of the inhabitants adhere to the Ethiopian Church. In "open areas" the missions may proselytise; in Ethiopian Church areas they may exceptionally be given permission to establish hospitals and non-denominational schools; but in these schools the religious instruction shall be confined to the principles of Christianity common to all Christian Churches.

What characterises the Law of Ethiopia, besides a certain primitiveness, is the Christian spirit and the survival of medieval Christian ecclesiastical rules. How this heritage from the past will be harmonised with the modern legislation on the lines of European countries has still to be worked out.

Norman Bentwich.

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JURIDICAL REVIEW

CHARITY OR "CHARITY"

Reflections on *Inland Revenue Commissioners* v. *City of Glasgow Police Athletic Association* [1953] 2 W.L.R. 625; 1953 S.L.T. 105; 1952 S.C. 102.[1]

IT is unlikely that many lawyers either in Scotland or in England will question the soundness of the judgments delivered by the House of Lords in the appeal of *I. R. C.* v. *Glasgow Police Athletic Association*, so far as they are concerned only with construing section 30 (1) (c) of the Finance Act, 1921, as amended by section 24 of the Finance Act, 1927. The rubric on this point in the *Weekly Law Reports* is concise and accurate: " A police athletic association claimed exemption from income tax under Sched. D. on the profits of their annual sports meeting:—*Held* (*per* Lord Normand, Lord Morton of Henryton, Lord Reid and Lord Cohen, Lord Oaksey dissenting) that the exemption could not be granted because the association was not established for charitable purposes only. Though the Commissioners were entitled to find that the purpose of increasing the efficiency of the force for the advantage of the public was charitable, the purpose of providing recreation for the members was non-charitable and was not merely incidental to the charitable purposes." Since this paper seeks to stress the difficulties encountered in interpreting this branch of the law, it may be observed in passing that the law in this particular case was sufficiently doubtful to justify the dissent of one of the three English Lords of Appeal. Further, some doubt was cast by their Lordships on the soundness—in respect of the particular facts proved, though not on the principle enunciated—of two English decisions (*Re Good*[2] and *Re Gray*[3]), which had been relied on by the Special Commissioners in sustaining the claim made by the respondents for exemption from income tax. The gift in the former case was of a library and plate for an officers' mess, and in the latter case of a fund for promotion of sport in a regiment, and these gifts had been held to be charitable under English law on the ground that, by increasing the efficiency of the army in which the public was interested, a direct public benefit was conferred. The Special Commissioners felt justified in extending this principle to an association for promoting the efficiency of police forces. Lord Cohen, however, it is submitted with respect, exposed the irrelevance of this reasoning in one sentence[4]: "They omitted, however, to notice that they were not concerned with the question whether a gift for the promotion of efficiency in the police force was a valid charitable gift but with the different question whether the respondent association was formed for charitable purposes *only*."[5]

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[1] A useful note on the decision in the Court of Session will be found in 1 *International & Comparative Law Quarterly* (4th Series) p. 402, by J. J. Gow.

The judges of the First Division of the Court of Session (sitting as Court of Exchequer) whose decision was reversed by the House of Lords would, it seems, have construed the statutory provisions in the sense favoured by the House of Lords[6] but, as Scottish judges, they felt themselves to be precluded in the circumstances from reviewing the findings in law of the Special Commissioners regarding the English law of charities. English law is a question of fact for a Scottish court. It may be observed with all proper respect that the view of the Scottish judges that English law had to be applied as such—though technically invalid for the reasons stated by Lord Normand and Lord Reid—deserved rather more sympathy and understanding than it received in the House of Lords. Though the ultimate decision has not kindled such feeling as the case of *Greenshields*[7] or the *Free Church Case*,[8] nevertheless it has not noticeably increased harmonious relations between Scottish and English law, nor between the most illustrious tribunals in each country.

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[2] [1905] 2 Ch. 60.

[3] [1925] 1 Ch. 362.

[4] S.L.T. p. 111; W.L.R. p. 639.

[5] Writer's italics.

[6] See Lord Carmont 1952 S.C. 109–110; Lord Russell p. 116.

The difficulties that confronted the First Division may be expounded as follows. In many statutes—particularly in taxation legislation, applicable to both Scotland and England—draftsmen tend to use the legal vocabulary of English law. How then should a Scottish court (which has no knowledge of English law except by proof, admission or reference under the British Law Ascertainment Act, 1859) construe such technical expressions of English law? While there is a presumption that a taxing statute must be so construed, so far as possible, as to make the burden the same under either Scottish or English law, it has not been suggested—except, it is submitted, in interpreting income tax statutes—that uniformity should be secured by compelling the Scottish judges to ascertain from a study of English law and decisions what technical construction an English court would place on words which the Act itself does not define. In *Lord Saltoun* v. *Lord Advocate*,[9] Lord Chancellor Campbell observed: "In construing the statute on which this case depends (the Succession Duty Act, 1853) we must bear in mind that it applies to the whole of the United Kingdom, and that the intention of the Legislature must be understood to be, that the like interests in property taken by succession should be subjected to the like duties wheresoever the property may be situated. The technicalities of the law of England and of Scotland, where they differ, must be disregarded, and the language of the Legislature must be taken in its popular sense." Lord President Inglis in *Baird's Trustees* v. *Lord Advocate*[10] expressed a like view: "It appears to me that in the construction of taxing Acts we must always take it for granted, where these Acts apply to the whole United Kingdom, that the words used by the Legislature are used in their popular and ordinary signification, and are not technical legal terms belonging to one system of jurisprudence which may exist in one part of the United Kingdom and not in another. The occurrence of such technical terms as these in a taxing Act would have the most disturbing and confusing effect, and it would be very difficult indeed to administer such a statute as applicable to the whole United Kingdom." Again, Lord Dunedin in *Lord Advocate* v. *Earl of Moray's Trs.*[11] (another estate duty case), observed [12] : " It is useless not to recognise the fact that such statutes are usually framed by draftsmen but little conversant with forms and requirements of conveyancing in Scotland, and that the phraseology which they employ is apt to be directed by the law of England, with which they are familiar. In such circumstances the Scottish court must do its best to give effect to the meaning of the statute, not by treating English law terms as unmeaning symbols, but as terms which, although not terms of art in Scotland, may be taken as words of ordinary popular signification, and as such are capable of application to the Scottish system." With this opinion, it may be observed, Lord Macnaghten concurred.[13]

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[7] Or *Greenshiels* 1711 Robertson 12.

[8] *Free Church of Scotland* v. *Lord Overtoun* (1904) 7 F. (H.L.) 1.

[9] (1860) 3 Macq. 659 at p. 671.

[10] (1888) 15 R. 682 at p. 688.

This solution seems as practical and satisfactory a solution as could be found in the circumstances, and it is therefore all the more surprising to find Lord Macnaghten, with the concurrence of two of the Law Lords, taking a very different view in construing the meaning of " charitable purposes " in *Commissioners for Income Tax* v. *Pemsel.*[14] At p. 577 he expressly rejected the proposition that in taxing Acts applicable to the United Kingdom as a whole " the words used by the legislature are used in their popular signification." It had been argued by the Crown in this English appeal that, since the law of Scotland did not attach a technical meaning to the words " charitable " and " charitable purposes," therefore in construing the Income Tax Act, 1842 (applicable to the whole of the United Kingdom) it was not appropriate in applying the Act in England to attach to these words the wide technical sense which they had acquired in Chancery practice by interpretation of various statutes, in particular of the Statute 43 Eliz. Cap. 4. The House of Lords, by a majority of one (Lord Halsbury L.C. and Lord Bramwell strongly dissenting), held, however, that the expression " charitable purposes " in this context fell to be construed according to the technical meaning it had acquired in English law. There was nothing in the Act which expressly compelled this construction; and there was certainly no doubt in their Lordships' minds that the technical significance of " charitable " in English law did not coincide with the popular meaning. At p. 581 Lord Macnaghten observed: " And yet of all words in the English language bearing a popular as well as a legal significance I am not sure that there is one which more unmistakeably has a technical meaning in the strictest sense of the term, that is a meaning clear and distinct, peculiar to the law as understood and administered in this country, and not depending upon or coterminous with the popular or vulgar use of the word." Nevertheless Lord Macnaghten held (p. 587) with the concurrence of Lord Watson and Lord Herschell that the expression " trust for charitable purposes " in the Act of 1842, and the other expressions in the Act in which the word " charitable " occurs, must be construed in their technical meaning according to English law. Moreover (at p. 590–591) he seems to lay down that each successive Income Tax Act, which does not expressly alter the law, impliedly ratifies extensions of the meaning of " charitable purposes " recognised by the courts prior to such Act. All three of the majority judges, relying largely on Lord Watson's guidance, apparently concluded that the significance of " charitable purposes " in Scots law was sufficiently wide to warrant stretching the meaning somewhat further for income tax purposes. (Lord Macnaghten p. 582, Lord Watson pp. 558, 561, 563, Lord Herschell p. 573.) Their Lordships also " disapproved " *Baird's Trs.*[15]; but, though that case probably asserted too strict a view of charity, it is difficult to accept the view that a Scottish decision can be set aside in an English appeal.

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[11] (1905) 7 F. (H.L.) 116, 13 S.L.T. 307.

[12] At p. 122.

[13] p. 119.

[14] [1891] A.C. 531.

Now, as Lord Moncreiff observed in *Macintyre* v. *Grimmond's Trs.*,[16] *Pemsel's Case* " was not a decision in a Scottish case, although the law of Scotland was much discussed." Technically it may be the House of Lords is not absolutely bound in a Scottish appeal by its construction of a United Kingdom statute in an earlier English appeal—but the point is almost academic in some cases.[17] At all events, *Pemsel's Case* has been treated in Scotland (as their Lordships clearly meant it to be) as virtually compelling the Scottish courts—but in Income Tax cases only—to give to such words as " charity " and " charitable purposes " the technical meaning which they would have in England. See *e.g.*, *Jackson's Trs.* v. *Inland Revenue*[18]; *Roll of Voluntary Workers* v. *Inland Revenue.*[19]

This gives rise to an anomalous and unfortunate situation. In Scots law a broad distinction is made between private and public trusts—not between private and charitable trusts. Lord McLaren has expressed the position as follows : " There is no distinction either as to construction or principles of administration between gifts to charitable uses properly so called, and gifts to purposes which, though not charitable, are lawful and useful. The true distinction is between private trusts and bequests, in which only individuals named or designed can claim an interest, and those which are intended for the benefit of a section of the public, and which may be enforced by *popularis actio.*"[20] In one sense " charitable " trusts are favoured as compared with other public trusts. Where there is a gift for " charitable purposes " the law will consider the meaning sufficiently clear though no further description is given, and thus the gift will not fail for uncertainty of description. A gift for " public purposes " or " for religious purposes " without further description would fail. The relevant authorities are fully discussed in *Wink's Exors.* v. *Tallent*[21] and *Rintoul's Trs.* v. *Rintoul.*[22] Paradoxically, though the expression " charitable purposes " is deemed by Scots law to be sufficiently definite guidance to an executor to implement a testator's intention, yet, because the expression has not a technical sense, there has been considerable divergence of judicial opinion as to what in fact it means. In *Baird's Trs.*[23] the First Division led by Lord President Inglis took the narrow view that popular meaning of charity was restricted to the relief of poverty. Though *Pemsel* was deemed to have excluded that construction for income tax purposes, it was reaffirmed in another context by Lord Halsbury in *Blair* v. *Duncan*[24] and, as Lord President Cooper has observed—without enthusiasm—in *Wink's Exor.*[25] and in the *Glasgow Police Athletic Association Case,*[26] this view has still some support. The better view, the writer submits, is that the meaning of " charitable purposes " in Scots law is substantially wider than Lord President Inglis assumed, though less extensive than the technical significance of the expression in English law. To argue this in detail would involve undue digression and reference may be made to the opinions expressed in *Wink's Exor.*[27]

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[15] *Sup. cit.*

[16] (1904) 6 F. 285 at p. 293, 11 S.L.T. 581.

[17] See the writer's *Judicial Precedent in Scots Law*, pp. 60 *et seq.*

[18] 1926 S.C. 579, 1926 S.L.T. 358, 10 Tax Cas. 460.

[19] 1942 S.C. 47; 24 Tax Cas. 329.

[20] McLaren, *Wills and Succession*, ii, 917, approved *Anderson's Trs.* v. *Scott*, 1914 S.C. 942; 1914, 2 S.L.T. 157.

Nevertheless, as has been observed, though the Scottish and English law regarding " charitable " and " public trusts " is materially different, in the isolated context of income tax law, the effect of *Pemsel's Case* and its *sequellae* has been construed to require the Scottish judges to apply the technical meaning which an English court would give to the terms " charitable " and " charitable purposes."

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[21] 1947 S.C. 470; 1947 S.L.T. 316.
[22] 1949 S.C. 297; 1949 S.L.T. 244.
[23] (1888) 15 R. 682.
[24] (1901) 4 F. (H.L.) 1; 9 S.L.T. 390.
[25] *Sup. cit.* at pp. 477–478.
[26] 1952 S.C. at pp. 117–8.
[27] *Sup. cit.*

The Special Commissioners in the *Glasgow Police Athletic Association Case*, founding on a number of English decisions, rejected the Crown's contention that the association was not established for charitable purposes only. When the Crown appealed to the First Division, all three judges in the course of very carefully prepared judgments expressed the view that, while they were bound to acquiesce in the application of technicalities of English law in Scottish income tax cases, they were not, as Scottish judges, bound or competent to pronounce on a question entirely of English law. The court could only take cognisance of foreign law as a question of fact which might be proved, or admitted, or stated in an opinion obtained from an English court under the British Law Ascertainment Act. Though on first impression their Lordships were somewhat surprised at the Commissioners' construction, they felt themselves precluded from investigating whether the Commissioners had erred in interpreting the law of England. Had Act of Parliament defined " charitable purposes " in the sense favoured by English law, then a Scottish court could construe the statutory definition. Had statute conferred on the judgment of Lord Macnaghten in *Pemsel quoad* " charitable purposes " a quasi-statutory authority, then that judgment might have been construed as a definite statement of the law. However, after considering such cases as *National Anti-Vivisection Society* v. *Inland Revenue*[28] the Scottish judges noted with some dismay that, though it is apparently deemed intolerable that for the purposes of income tax law the Scottish and English construction of " charitable " should diverge, yet the English law regarding charity has an ever-changing content which depends on the application of certain principles by the Court of Chancery. Very considerable developments have taken place in the English law of charities since *Pemsel*—especially during the last ten years. During this period at least forty English decisions have been reported, of which seven were carried to the House of Lords. Further, the crucial test in England of whether a trust is charitable or not apparently depends on whether the Attorney-General on behalf of the Sovereign as *parens patriae* may competently intervene, a test which has no counterpart in Scottish practice. In short, the court found itself in a humiliating and helpless predicament. Accordingly, it recorded with dignity and restraint—and with detailed reasoning—its regret that it should have to give its attention to an appeal which in its view was an empty formality, since a Scottish court could not pronounce on English law.

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[28] [1948] A.C. 31.

The attitude adopted by the First Division was conceded some formal sympathy and more general criticism in the House of Lords. Lord Normand [29] referred to *Pemsel's Case* and to the relevant statutory provisions and observed, " The Court of Session has therefore a statutory duty to decide any question of law that may come before it in a claim to exemption, and the law which it must administer is the English law of charity. The necessary effect of *Pemsel's Case* and now also of the provisions of section 19 of the Act of 1925 is that the English law of charity has, for income tax purposes and for them alone, to be regarded as part of the law of Scotland and not as a foreign law." The writer experiences difficulty in deducing in what way section 19—which is concerned with the machinery for claiming—can be said to impose the English law of charity upon Scotland, but, if *Pemsel's Case* is to be accepted as law in Scotland, it is difficult to escape from the painful logic of Lord Normand's conclusion that this case imposed on Scotland the English law of charity *quoad* income tax questions as United Kingdom law. Lord Reid[30] made this point with particular clarity: "The First Division have held that they are not competent to decide what is a charitable purpose because that is purely a question of English law. In this I think that they were mistaken. It has commonly been accepted since *Pemsel's Case* that the words charity and charitable in income tax legislation must be interpreted according to English law, but I do not think that that is a full or accurate statement of the position. In my judgment holding that those words must be interpreted according to English law must mean that it is to be held that Parliament enacted that on that matter the law of England should also become the law of Scotland, and it must follow that Parliament must be held to have placed on the courts of Scotland the duty of administering what was formerly only the law of England but what has been made by Act of Parliament the law of both countries."

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[29] p. 629.

The situation for any Scottish court is now intolerable. The judges of the Court of Session are enjoined to apply as Scottish law—according to a Chancery tradition to which they are necessarily strangers—a foreign law of changing content. Indeed the dilemma is even worse than Lord President Cooper deplored. Had it been the duty of the Scottish court to apply English law merely as foreign law, recourse might have been had to the procedure laid down under the British Law Ascertainment Act, 1859. It seems, however, to follow from the dicta of Lord Normand and Lord Reid that this course is not open to a Scottish court, since by section 1 of the Act, an opinion may only be sought "on any point on which the law of such other part of Her Majesty's dominions is different from that in which the court is situate. . . ." If what was English law has now to be administered as the law of the United Kingdom, it would seem that the Scottish courts could not demand the opinion of the English courts regarding specialities of the English law of charities.

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[30] p. 638.

Cold comfort was offered by a number of Lords of Appeal when they observed that English equity lawyers often found difficulty in venturing confident opinions regarding " charitable purposes in English law." Certain further observations [31] by Lord Normand are not altogether without an element of perplexity : " In certain respects the jurisdiction is less embarrassing than their Lordships seem to have supposed. They are technically not bound by the decisions of the English courts in the matter of charities and it is not improper for them to discuss or criticise English decisions. The Court of Session is not reduced to the role of an obsequious follower of decisions either of a judge of first instance or of the Court of Appeal, though it is only good sense to pay special regard and respect to the decisions and opinions pronounced by the English courts on a branch of the law built up by English judges, and familiar to them by long training and experience." The English law of charities is surely essentially a matter of case law—ratified, it may be, as Lord Macnaghten suggested in *Pemsel's Case*, by a succession of statutes. It seems, nevertheless, to be suggested by Lord Normand that the Court of Session should take heart of grace, and criticise the decisions of experienced Chancery judges on matters within their own special and admittedly technical field—knowing presumably that in the last resort the most eminent English Chancery lawyers in the House of Lords will put right any unfortunate misunderstandings.

The situation to some extent recalls the stresses created by the Treason Act, 1708 (7 Anne, c. 21), which provided that crimes construed to be treason in England should thenceforth be so construed in Scotland. This measure was strongly opposed on various grounds by the Scottish representatives in the United Kingdom Parliament [32] and the Scottish peers urged that, for the information of Scotsmen, at least an enumeration of the English laws of treason should be annexed to the Act. In England the

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[31] p. 630.

[32] See Mackinnon, *Union of England and Scotland*, 367 *et seq.*

Statute of Treason of 1351 had become heavily encrusted with judicial interpretation. The abstract, though promised, was never drafted, with the result that—in interpreting the law of treason, as in construing " charitable purposes "—the Scottish courts are set in pursuit of a juristic will-o'-the-wisp. Indeed, in practice today prosecutions for treason do not take place in Scotland. Faced with an unprecedented case like that of William Joyce (*Joyce* v. *D.P.P.*[33]) the Scottish courts would have experienced gravest perplexity in deciding what view an English court would take. Cockburn recalls [34] that because of such difficulties, Commissions of Oyer and Terminer on the English model were set up to try Scotsmen on treason charges in Scotland in 1820—with an English prosecutor to keep the court right on the English law. Such an arrangement is clearly inconsistent with the severalty of administration of justice guaranteed by the Union. Indeed the Scottish peers in 1708 urged that the proposed Act assimilating the Scottish law of treason to that of England contravened the guarantees contained in the Treaty and Act of Union. Article XVIII provided that, though no alteration should be made in the laws which concern private right, except for evident utility of the subjects within Scotland this restriction did not limit alteration of the law in questions of public right—except, of course, where such alteration might conflict with the express terms of the Treaty of Union. The criminal law (treason) seems clearly a matter of public right, as does the law of income tax. Therefore, Parliament is presumably free to ordain (as the majority in *Pemsel's Case* asserted) that Scottish courts shall apply as their own law a fluctuating and artificial concept of English law—but without assistance from statutory definition or the right to ask for an expert opinion from the English courts. If the same clumsy and tactless methods of legislation had been attempted in matters of private right (*e.g.*, the meaning of " charity " in the law of succession), Article XVIII of the Treaty of Union 1706 approved in the Act of

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[33] [1946] A.C. 347.

[34] *Memorials*, p. 366.

1707 would be very relevant. It can scarcely be to the evident utility of the subjects within Scotland that their legal advisers from John o'Groats to the Tweed should have to subscribe directly or indirectly to the English Chancery Reports to qualify themselves to speak with diffidence as to the law applicable in Scotland. " Suppose "—as Lord Bramwell said in *Pemsel*[35] " the case arose in England, and we were asked to interpret a statute not according to its ordinary meaning, but according to some mode of expression used in Scotland? " In such a case it is probable that the House of Lords unless enjoined by statute in the clearest and most unequivocal terms would reject a construction which would compel practitioners from Land's End to the Border to ascertain the law of England by diligent perusal of the *Session Cases* and the *Scots Law Times*—fortified by the information that sixteenth-century Scottish statutes have been at times very freely construed in Scottish decisions. Had the House of Lords been compelled to adopt such a construction, the resulting indignation and inconvenience would, it is conjectured, very soon have compelled Parliament to amend the law. Yet this situation in reverse is the consequence in Scotland of Lord Macnaghten's construction of United Kingdom income tax legislation.

The conclusions to be drawn seem to require no elaboration. They are, first, that Lord Macnaghten in *Pemsel* failed to foresee the full difficulties which his construction of " charitable purposes " would involve for the Scottish courts; secondly, that *Pemsel* should straightaway have been challenged and repudiated as an authority strictly binding on the Scottish courts; and, thirdly, that Parliament should undertake, as a matter of urgency, legislation to free the Scottish courts from an intolerable dilemma.

T. B. SMITH.

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[35] p. 568.

RUN-RIG AND THE ENGLISH OPEN FIELD SYSTEM

THE late Professor Rankine[1] with many others of his time postulated " communism " as a stage of development in the history of land property : a view which has since proved unpopular, especially with the great English legal historian, Maitland. This article is intended to show that if the latter had directed his attention to Scotland he might well have had to modify his view that the English open-field system is not the result of communal landholding at an earlier period.

We must first observe that there is no special reason why we should consider it more likely to find in a primitive society communal rather than individual or family landholding : except perhaps that pastoral peoples almost invariably treat the grazing land as common to all their members, and agriculture certainly developed later than herding. The view that there is some divine or natural law by which land is the common property of the community can be traced to the sort of argument that led astray the usually ultra-conservative Blackstone.[2] He felt that he was bound by the text " let them have dominion over the fish of the sea, and over the fowls of the air, and over the cattle, and over all the earth," [3] to postulate a primitive communism, which only gave way to individual ownership at a later date. But this rests on a misinterpretation of the Hebrew. The word rendered " have dominion " in the Authorised Version[4] properly signifies a giving of " sovereignty " or " command " rather than ownership.[5] Moreover, wild animals and birds are not regarded as being by natural law owned by the human race or a community before capture, but are *res nullius*.[6] This is not the same thing as *res communes* or *res universitatis*.[7] Yet they are as much included in the text as is land.

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[1] *Landownership*, 4th ed. (1909), 599.

[2] *Commentaries*, II, 2–3.

[3] Genesis I, 26, 28.

[4] Rah-dah. (Greek *ἀρχεῖν*). I am indebted for this note to Rev. R. A. B. Ewbank, M.A.(OXON.).

But another school, of a more historical character, claims that certain passages from Caesar and Tacitus prove that among the Teutonic tribes of their epoch the ownership of land was vested in the community itself, or in the tribe or nation of which the community formed a part.[8] Although certain writers have warned us to treat these passages with caution,[9] it does not seem unreasonable to follow Holdsworth [10] in regarding them as probably accurate observations of Teutonic tribes as far as they go.

The two passages generally relied on in this connection run as follows: "neque quisquam agri modum certum, aut fines proprios habet; sed magistratus et principes, in annos singulos, gentibus et cognationibus hominum qui una coierunt, quantum eis et quo loco visum est, attribuunt agri, atque anno post alio transire cogunt," [11] and "agri pro numero cultorum ab universis in vices occupantur, quos mox inter se secundum dignationem partiuntur. Arva per annos mutant et superest ager." [12]

Maitland has warned the would-be legal historian of the dangers of basing results on analogies between different systems of law.[13] These practices among Teutonic tribes are admittedly very indirect evidence of the existence of similar stages of development in Britain. But the sceptical reader is asked to compare with what he has just read the following account of agriculture as practised in the Outer Hebrides as recently as the last century:

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[5] *Cf.* the same confusion as to *dominium*, discussed Pollock & Maitland, I, 208. The Vulgate uses "dominari" in V. 28, but "praesse" in V. 26. Stair (II,1,i) says of the passage in question, "it did not import a present right of property, but only a right or power to appropriate by possession, or *jus ad rem*, not *jus in re*." This is nearer to the Hebrew than Blackstone's view.

[6] Institutes, II,i,12; Blackstone, *op. cit.*, 10th ed., II, 390; Stair, II,1,33.

[7] Institutes, II,i,1,6.

[8] Stubbs, *Constitutional History*, 4th ed., 19.

[9] *e.g.*, Flach, *Les origines de l'ancien France*, II,45; Vinogradoff, *Villeinage in England*, 24.

[10] *History of English Law*, II, 62.

[11] *De Bello Gallico*, VI, 21.

[12] *Germanica*, c. 16.

[13] Pollock & Maitland, I, introd., xxix.

> "The townland of Hosta is occupied by four, Caolas Paipil by six, and the island of Heisgeir by twelve tenants. Towards the end of autumn, when the harvest is over . . . they meet, and having decided upon the portion of land to be put under green crop next year, they divide it into shares according to the number of tenants in the place,[14] and the number of shares in the soil they respectively possess. Thereupon they cast lots,[15] and the share which falls to a tenant he retains for three years. A third of the land under cultivation is thus divided every year. Accordingly, the whole cultivated land of the townland undergoes redistribution every three years. Should a man get a bad share he is allowed to choose his share in the next division.[16] The tenants divide the land into shares of uniform size. For this purpose they use a rod several yards long. . . . Occasionally, and for limited bits of ground, the people till, sow and reap in common, and divide the proceeds into shares (*Rainn*) and draw lots.[17] . . . In reclaiming moorland, the tenants divide the ground into narrow strips of five feet wide or thereby. These strips, called lazy-beds, the tenants allot among themselves according to their shares or crofts." [18]

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[14] "Pro numero cultorum" (Tacitus, *cit. sup.*); "proportionels au nombre des habitants" (Girard, *Droit Romain*, 4me ed., 257: of Russia). "En tantas parcelas como vecinos labradores viven en el pueblo." (Espejo, *Village Communities in Spain*, Quart.Rev. 1895, 502).

[15] *Cf.* Girard, *loc. cit.*, of Russia and Germany. These were both strip systems. (See Vinogradoff, *op. cit.*, *supra*, 254; Seebohm, *English Village Community*, Chaps. 9, 10).

[16] This shows that even under a strip system designed to equalise the quality of the holdings, perfect equality may not be obtained. Hence the continuance of periodic redistribution on uneven-quality sites.

[17] *Cf.* Maitland, *Domesday Book and Beyond*, 346: "Our evidence does not point to a communistic division of the fruits."

[18] Skene, *Celtic Scotland*, III, 380, quoting Alexander Carmichael, a local resident. Confirmed by Crofter Commission Report, 1884, Parliamentary Papers, xxxii, 461–6. Lord St. Vigeans (*Sources of Scots Law*, Stair Soc. I, 167), affirms that instances were still found as late as 1936.

All the arable land referred to was arranged on a run-rig basis, *i.e.*, the alternate ploughing ridges of the field were assigned to different tenants.[19] This ridge was also the origin of the English strip [20] and in fact there is no distinction between them. Miss Grant supposes a distinction to be that in Scotland the rigs run at right angles to the contours, while in England they run with them.[21] This last, however, is not true, as a visit to Laxton or Haxey would have shown her. She cites the horizontal " strip lychets " found in parts of England, but these could not have been made with a plough and have no connection with the open-field system.[22] Anyone who contests this is invited to try to plough—preferably with oxen—on a steep hillside along the contours! There was also grazing land, the grazing on which was common, but regulated with great nicety to secure equality of user by all. Thus, *e.g.*, one cow was equal to eight sheep, twelve hogs or sixteen geese, while a four-year-old horse was equal to two cows.[23]

How could this system possibly have come about if we assume an initial individual holding of the land in question? All that we know of human nature teaches us that the man who had the best bit of land at the beginning would not voluntarily agree to share his good fortune with the rest, especially under such a chancy system of re-allotment, by which he might not recover its use for a very large number of years. The soil varied from pure sand to pure moss.[24] Hence the continuing of the system. In England and the Lowlands the land became by cultivation of uniformly high quality and so the redistribution was dropped, being unnecessary. It is proposed to show that the arrangements just described are in fact the origin of the so-called " English " open-field system.

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[19] Carmichael, *cit. sup.*, 379.

[20] Orwin, *The Open Fields*, 32*ff.*

[21] *Social & Economic Development of Scotland*, 100.

[22] Orwin, *op. cit.*, App.

[23] Skene, *op. cit.*, 383. *Cf.* the figures quoted by Innes (*Scotch Legal Antiquities*, 268) for Struan.

[24] Skene, *op. cit.*, 379.

This contention may be met by the argument that this was a peculiarly English, or at least Teutonic system and that analogies from other countries are therefore totally irrelevant. But the facts seem to be otherwise. Open-field systems exactly similar to that of England can be found all over Europe: Slav,[25] Latin [26] and Celtic,[27] as well as Teutonic.[28] Thus it was very common in Czechoslovakia until the recent *coup d'état*.[29] Nor is it unknown even outside Europe.[30] The inference is then very strong, that this is no peculiarly Germanic or English system, but represents a certain stage of economic development which many—but by no means necessarily all—peoples have passed through. It is suggested that it also implies the stage of communal landholding to which Rankine refers. We must not be misunderstood as reviving any idea of communism as an inevitable stage of development. What is suggested is that where there is open-field cultivation with strips, some process of development such as that outlined probably took place. With this view Maitland strongly disagreed.[31]

The example of run-rig just quoted is by no means an isolated instance. It was extremely prevalent throughout the Highlands and Isles.[32] The practice was sufficiently important in the seventeenth century to justify the passing of a public Act,[33] which tells of the "great Disadvantage arising from lands lying run-rig, and that the same is highly Prejudicial to the Policy and Improvement of the Nation," and permits enclosures. From the cases under this Act reported in Morrison's *Dictionary of Decisions* we can appreciate how very widespread the strips were, even in the Lowlands. They concern lands at Holehouse (near Falkirk), Dunglas (East Lothian), Inveresk (near Edinburgh), Little Udston (Lanark), Tranent (East Lothian), Newhaven (Leith), Inchyra (Fife), Sibbaldie (near Lockerbie), Dalmarnock (Lanark), and Douglas (Lanark). In *Russel* v. *York*[34] the origin of run-rig is discussed:

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[25] *e.g.*, Russia (n. 14, *supra*), Czechoslovakia (*infra* in the text), and in Poland (Bigland, *Laughing Odyssey*, 22) as late as 1937.

[26] Bloch, *Les caractères originaux de l'histoire rurale française*. *Cf. Village Communities in Spain*, Quart.Rev. 1895, 482*ff*. This article shows that the three-field system in Spain implied periodical redistribution (at p. 502). The infield-outfield system was also fairly common. The article and the Spanish authorities on which it is founded have been overlooked by most writers on the English field systems.

[27] In Brittany. (Seebohm, *Customary Acres*, c. III and map.) For Wales, see Palmer & Owen, *Ancient Tenures in Wales and the Marches*.

[28] Examples may still be seen near Fuson, Bavaria. The system also existed in Denmark. (Kruse, *The Right of Property*, 180; Vinogradoff, *The Growth of the Manor*, 264.) Here there was a regular redistribution.

[29] *Picture Post*, September 7, 1946.

[30] *e.g.*, in India, with redistribution "so as to give every man a share of every quality, which resembles our medieval common-field system even in minute detail." (Pollock's notes on Maine, *Ancient Law*, citing Baden-Powell, *The Indian Village Community*, 194*ff*.) *Cf.* Maine, *The Early History of Institutions*, 81–2.

[31] Note 80, *infra*.

[32] Skene, *Celtic Scotland*, III, c. X; Grant, *Social and Economic Development*, 104. *Cf. Gray* v. *Richardson*, 3 R. 1031; 4 R.(H.L.) 76.

> "Formerly it was the custom of every person occupied in the tillage of the ground to gather themselves together in villages for their mutual support and defence, so that the whole tenancy of an estate lived together in one place, and betook themselves to detached dwellings and farmsteadings only when the change in the manners of the country enabled them to do so with safety."

This shows how the idea of community life goes with the strips, that the system was well-nigh universal, and that originally it was the tenants who had strips. But by 1695 they had long been permanently assigned in the Lowlands to different proprietors. This, as we shall see, was also true of England. The outlook of the judges was so Lowland that they defined run-rig for the purposes of the Act as "where the alternate ridges of a field belong to different proprietors."[35] This made it inapplicable to the Highlands, where tenancy, and repartition in many cases, still prevailed.[36] The grazing was, however, still very often common even in the Lowlands.[37] It seems almost invariably so to remain long after the strips are separately owned. This is due to the nature of grazing, which cannot conveniently take place on very small fenced-in plots. Hence, when all was grazing, all was common.

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[33] Acts of the Parliaments of Scotland, IX, 421, c. 36 (1695).

[34] (1774) Morrison 14145. The *Registrum de Dunfermelyn* (pub. 1847) mentions (pp. 285–1437): "Ten fute of the rynryg of the abbot and twenti fute of the rynryg of the said David."

[35] Erskine, III, 59.

[36] Skene, *Celtic Scotland*, III, 372.

[37] As to commonties, see the opinions in *MacAndrew* v. *Crerar*, 1929 S.C. 699.

An English traveller in eighteenth-century Ireland observed that[38] "there is a custom here called run-dale,[39] which is a division of the farms into spaces by balks, without fences, which they take here and there exactly like the common fields of England." Unlike England, however, the ground was still poor enough to make redistribution desirable. In West Meath in the eighteenth century the pasture land was common, while the arable was divided among the members of the community as follows:

> "The whole field was divided into plots of an acre, half an acre, or quarter of an acre,[40] measured with a rope.[41] These plots were then grouped into as many shares as there were ploughs in the townland. The utmost care was taken by joining together, in one share, plots good and bad, from different quarters of the field, that the shares might be of exactly equal value. Then came the distribution: a number of stones or sods of turf, equal in number to the shares into which the land had been divided, were placed in a row on the ground. Then each man entitled to a share placed in a hat, in view of all the others, some distinguishing article—a bit of stick, a pebble, a scrap of iron, a rag, a flower, etc. Then a child or a stranger was called upon to draw these lots."[42]

These two examples may be explained away by some on the grounds that both these instances are examples of tenant holdings, subject to the common ownership of the same landlord, who might have devised the system to secure an equal distribution among his tenants.[43] But which came first is by no means certain. The traditional view of English law was, *e.g.*, that commons originated in every case by way of the grant of common pasturing rights to the tenants of the manor by the lord. Williams[44] showed that more usually they were survivals of pre-feudal arrangements, on which at a later date the lord was superimposed. This view received cautious judicial approval from Lord Hatherley L.C. in *Warwick* v. *Queen's College, Oxford.*[45] In Scotland the traditional view was the same,[46] but there, too, modern judges have been known to dispute it.[47] Miss Grant's views on this subject must be read with caution.[48] Then again the Hebridean villagers were probably, at least in origin, all members of the same clan,[49] between whom common ownership might be thought to be more likely than among unrelated villagers.

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[38] Arthur Young, *Tour of Ireland*, I, 213.

[39] This is the Irish term for run-rig. (See New English Dictionary.) In Scotland, though often used as a synonym, it has a technical sense of contiguous larger holdings. (*Chalmers* v. *Pew* (1756) Morr. 10485.)

[40] English strips usually extend to an acre, or half, or quarter of an acre. (Holdsworth, *History*, II, 56–7.)

[41] This is also found in Russia (n. 15, *supra*) and Denmark (n. 28, *supra*).

[42] J. Mill, *Tenants and Agriculture near Dublin in the Fourteenth Century*, Proceedings, Royal Soc. of Antiquaries of Ireland, I,1, 57.

Both these objections can be met by giving one example from the Lowlands, although this represents a somewhat later stage of evolution—it is suggested—as here some of the land (the " infield ") has become permanently allotted, while the process which we have just observed continues with regard to the remainder (the " outfield "):

> " There are within the bounds of the royalty of the burgh of Lauder 105 separate portions of land called Burgess Acres.[50] These vary in extent from one and a half acre to three and a half acres. To each such acre there is a separate progress of writs, and these ' acres '

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[43] But the landlord's demesne is often composed of scattered strips itself. (Maitland, *Domesday Book*, 337.)

[44] *Rights of Common*, 31, 71*ff*.

[45] (1871) L.R. 6 Ch.App. 716.

[46] *Douglas* v. *Inglis* (1777) Morr.App. " Run-Rig."

[47] *Per* Lord Hunter, *MacAndrew* v. *Crerar*, 1929 S.C. 699, 710.

[48] *Op. cit.*, 68.

[49] Skene, *Celtic Scotland*, III, 369.

[50] Possibly they were originally an acre in extent as the name suggests. If so, they closely resemble in size the English strips. There, too, the tendency was towards a gradual consolidation into somewhat larger holdings. (*Cf. e.g.*, Laxton, *infra*, in the text.)

> are the private and absolute property of individuals.[51] . . No one has hitherto been admitted a burgess of the burgh who has not been an owner of one of these Burgess Acres.[52] The land of the Burgh consists of . . . Lauder Common, extending to about 1,700 acres, which has, from all time of which there is any record, been possessed thus. A portion of it has been set off periodically, say once in five or seven years, to be broken up and ploughed during that time, and at the end of that time fixed has been laid down in grass, and grazed along with the other lands : when another portion of the common was, in the same way, broken up and ploughed, and again laid down in grass. . . . An allotment of this portion of the common has been given to the owner of each of the 105 Burgess Acres, whether he happened to be a burgess or not, one allotment for each acre.[53] The portion laid off for cultivation is, in the first place, cut into the number of allotments required, and the share of each person is decided by lot. . . . The whole of the rest of the common has been used for grazing purposes."[54]

There seems, then, considerable evidence that Rankine's "stage" of local community landholding was in fact known in Scotland, both Highland and Lowland, as well as in parts of Ireland, at one date or another. We must, of course, bear in mind that ownership, especially in relation to land, is a comparatively late conception. Primitive communities are less concerned with legal niceties than with the practical difficulties of wringing a bare subsistence from the land.[55] Probably even then the question of communal or individual property was one of uncertainty.[56] But if men behave in such a fashion as to show that they regard the land as the community's, to be distributed by lot because all are more or less equal members of the community, it seems reasonable to speak of "community landholding."

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[51] These words cannot be taken literally, to exclude the ultimate *dominium* of the Crown. Only in Norse udal lands in Orkney and Shetland does this have exceptions.

[52] Maitland used the fact that in all the cases he could find only some of the burgesses held land, to show that there was no holding by the township in Saxon times (*Domesday Book*, 200). The corporation here is extremely simple, there being only one class of burgesses. Maitland attacked some alleged "survivals" because the corporations were complex in structure. (*The Survival of Archaic Communities*, Col.Pap. II, 333*ff*.)

[53] "Then belongeth the fifth acre of the partible meadow to that hide." (Hemingford Cart. f. 72 cited Thorpe, *Ancient Laws of England*, I, 102). *Cf.* the custom at Aston (*infra*, in the text).

[54] *Return of Boroughs . . . possessing common land*, 1870, H. Commons Pap., App. I.

English readers may seek to dismiss all this as a Celtic curiosity.[57] They must, however, bear in mind that although it may not be generally realised in England—such is their ignorance of Scottish history—Scotland south of the Forth[58] never was anything like as subject to Celtic influence as the rest of Scotland. Even in the Roman period it had formed from time to time part of the Imperial province of Valentia. At a later date the Gaelic inhabitants had been driven out of it, or completely subdued, by Anglo-Saxon settlers. These annexed it for several long periods—the last one ending with the Scots victory at Carham in 1018—to the English kingdom of Northumbria.[59] Since when "the pure Saxon language, without the least mixture of the Gaelic . . . has been the established language of the low countries of Scotland,"[60]—a transformation not yet achieved in Wales after six centuries of English domination. According to tradition the superb capital of Scotland takes its name from Edwin of Deira (617–633), a Saxon king of Northumbria.[61] In view of this prevalence of Saxon institutions, it would be very odd if landholding there should be carried on according to peculiarly Celtic ideas. Moreover, Scotland's economic historian[62] has shown that the Lothians probably influenced the rest of Scotland in this, and not vice versa.

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[55] Orwin, *The Open Fields*, 3.

[56] Holdsworth, *History*, II, 62.

[57] *e.g.*, Maitland, *Domesday Book*, 346.

[58] Lauder is in Berwickshire.

[59] See as to this Hume-Brown, *History of Scotland*, I; Hodgkin, *History of The Anglo-Saxons* (*passim*).

[60] Ross, *Lectures*, II, 54.

[61] Hume-Brown, *op. cit.* 15. But see Watson, *The Celtic Place-Names of Scotland*, 340*ff*.

[62] Grant, *op. cit.*, 107; also showing that agriculture was unknown among the Gaels in this part of Scotland before the Saxons arrived.

But in fact we can show that this is not a purely Celtic practice[63] by crossing the Tweed in a southerly direction. At North Middleton in Northumberland up to 1847, we find a similar procedure, but going back again to the earlier epoch when all the arable and meadows were divided:

> "The general rule of cultivating and managing the lands within the township has been for the proprietors or the tenants to meet together and determine how much and what particular parts of the land shall be in tillage, how much and what parts in pasture; and then they divide and set out the tillage and meadow land among themselves in proportion to the number of farms or parts of farms to which they are respectively entitled within the township, and the pasture lands are stinted in the proportion of twenty stints to each farm."[64]

When we remember the bitter Border feeling right up to the time of the union of the Crowns,[65] it seems most unlikely that this procedure was adopted through conscious admiration for Scottish models such as that at Lauder. There are many other instances, most of them critically examined by Maitland.[66] He shows that some English examples resembling that at Lauder have arisen in comparatively recent times. This only increases the probability of similar developments by which communal property in land became individual via the stages in question, at an earlier date.

We will now turn to the English "open-field" system itself, to see whether it may not be merely the final stage of the process that we have been observing. This system prevailed over the greater part of England[67] throughout the Middle Ages. Indeed, it was very far from being a rarity as late as the reign of George III, during which many private Acts of Parliament were passed to effect enclosures, culminating in a public Act in 1845 [68] and others right up to the present century. Occasional examples of it may still be found at the time of writing. Laxton in Nottinghamshire is the most perfect. We visited it in May, 1950, and found the three-field system in full working order, although rather unpopular with the farmers, as tractors spend much more time running about among the strips than would be the case with consolidated fields. At Haxey in Lincolnshire many strips also exist, although not in the same complete condition.

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[63] *Cf.* also nn. 25–30, *supra*.

[64] F. W. Dendy, *Archaeologia Aeliana*, New Series, xvi, 138.

[65] Some idea of it may be gained from the epistle dedicatory to Nicholson, *Leges Marchiarum* (1705).

[66] *The Survival of Archaic Communities*, Col.Pap. II, 313–65.

[67] It was never universal. Jutish influences kept Kent distinct (see Hodgkin, *op. cit.*, I, 370, n. 20).

Much has been written on the subject of the system [69] and therefore only a brief account need be included here. The following was written by a recent vicar of Laxton:

> " The farmers are tenants,[70] but instead of their land lying in compact blocks about the farmstead, it consists of three unenclosed fields of about 300 acres each. . . . Each year one of these fields lies fallow,[71] one is sown to wheat, and one to other crops. The fields are divided into strips of various sizes [72] averaging about three and a quarter acres,[73] distributed among the various tenants. In olden times, when the oxen had to be outspanned at midday, it was convenient to have a strip of pasture lying across the end of the furrows. . . . At midsummer every year at a special auction, the right to cut the grass for hay in the various meadows is sold to tenants or freeholders in the parish. . . . The fields themselves are thrown open for common grazing after the crop has been removed.[74] The field is then said to be broken. . . . Every year after the wheat has been sown, the jury

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[68] 8 & 9 Vict. c. 118. *Cf.* Holdsworth, *History*, II, 65*ff.*

[69] *e.g.*, Seebohm, *English Village Community*; Orwin, *The Open Fields*; Holdsworth, *History*, II, 55*ff.*

[70] But freehold land, *e.g.*, the glebe, is mixed up with their holdings.

[71] *i.e.*, bare-fallow: ploughed up and left unsown. Holdsworth (at p. 57) speaks of pasture rights on the fallow. This could only be between harvest and ploughing, though at Laxton sheep are sometimes put on the fallow field to clear the weeds.

[72] But always the same shape, very long and narrow. This was the best shape for ploughing (Seebohm, *op. cit.*, 2). This accounts for its very wide geographical distribution.

[73] *Cf.* Lauder (*supra*, in the text). They were formerly smaller, as this account tells us later.

[74] *Cf. Sir Miles Corbet's Case* (1587) 7 Co.Rep. 5a.

> meets and inspects it. The ancient landmarks (stinting pegs, or boundary stakes) must be carefully examined to see that each is intact and in its rightful place.[75] . . . In modern times the fields have been replanned, so as to provide larger strips. The older . . . average strip was three-quarter acre. In the latest redistribution, in 1904 . . . the average size of the parcels was increased to three and a quarter acres.[76] Another important element in the Laxton system is that, instead of being scattered on isolated farms the people all live in the village." [77]

In addition to the rights mentioned, every one entitled to a strip had a carefully regulated right to pasture animals on the common. At first this would be no more than a free natural user of the superfluous waste land within the township. Later it became the subject of rigid legal definitions.[78]

Maitland might be described as the enemy of the idea of community landholding.[79] Of the English system just considered he wrote: "Our evidence does not point . . . to a time when a village council or a majority of villagers conceived that it had power to re-allot the arable strips at regular or irregular intervals." [80] He thinks that the strips were permanently allotted from the beginning. But it is submitted that the evidence is clear that such redistribution did in fact take place. At first the distribution was annual and of the whole land. We have seen this happening in West Meath and in Northumberland. A slight modification was that only one third of the arable was changed every year, as in the Hebrides. Then some of the arable becomes so equal in quality that there is no point in the exchange and it is permanently allotted. The rest (the "outfield") remains divisible, as at Lauder, although the intervals have grown longer as agriculture developed. Finally all the arable, being equalised through the rotating three-crop system,[81] stands permanently allotted, subject to very occasional redistribution when necessity arises, as at Laxton, while the meadow land, or some of it, remains divisible by lot. Thus at Aston in Oxfordshire in the seventeenth century:

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[75] "Twenty-six acres belonging to the *dos* or glebe of this Church have been lost. No such lands, as described in the terrier, can, at this time, be found in the fields. Such a circumstance is not unlikely to happen in the case of lands in an open field, which are usually divided into a great many selions; and, owing to the number of proprietors, are continually passing from one person to another by way of sale or exchange" (Reade's *History of the Isle of Axholme*, 39). *Cf.* Proverbs xxiii, 10–11.

[76] "While we have no documentary evidence of what happened at Laxton before 1635, it may safely be assumed that the processes of consolidation and re-allotment of strips . . . were normal incidents from very early times. . . . After 1635 there is a wealth of documentary evidence for the continuation of these processes" (Orwin, *The Open Fields*, 186, 191).

[77] Keeton, *Laxton and its Past* (1943).

[78] See Halsbury's *Laws of England*, IV, 530, and the authorities there cited.

[79] Domesday Book, 340*ff*; *The Survival of Archaic Communities*, Col.Pap. 313–65.

[80] The former, at p. 346.

> "Each yard-land carried with it the right to a lot mead. The meadow was laid out in sixty-four portions, and in every year, each yard-land had one of these portions assigned to it. This assignment was effected by a lottery. Each yard-land had a wooden mark belonging to it, bearing some device; the marks were placed in a hat and the owner of the first mark that came out of the hat became entitled to the piece of meadow that was known as 'the first set.'"[82]

The meadows were "broken" after the hay harvest and grazed on in common. The similarity between this example and that in West Meath is most striking; although significantly there it was the arable fields which were thus distributed. Eventually even the allotment of the meadows is dropped (though at Laxton they are still let annually), but the "breaking" of the fields for common grazing preserves the memory of former customs. Still later, as now at Haxey, the strips bear different crops at the discretion of the farmers and are never broken.

It would prolong this discussion unduly to discuss here all the English evidence that a redistribution of the arable was once known there,[83] in spite of Maitland's assertion to the contrary. One or two instances must suffice. In the laws of Ine, King of the West Saxons (688–725) we read[84]: "Gif ceorlas gærs-tùn hæbben gemaènne, ođđe ođer gedálland tò tỳnanne, and hæbben sume getỳned hiora dæl, sume næbben." (If ceorls have a common meadow or other partible (share) land to fence, and some have fenced their share and others not.) It is suggested that the *ođer gedálland* must have been arable. No case of the pasture being partible has ever come to light. The pasture was not then fenced, but the meadows or arable, to keep the cattle off.[85] Meadow, pasture and arable are the only types of land possible here. At Wahull in Bedfordshire in Henry II's reign some confusion having arisen as to the strips, they were parcelled out afresh by the old men of the village with a rod.[86] Finally, it is scarcely without significance that in the Isle of Axholme, much of which was only reclaimed from swamp in the seventeenth century, the selions or strips are locally called "cavells."[87] The state of the ground in the open fields there, being part waterlogged, part firm, meant that lot-distribution was still pointful. It therefore probably continued as in the Hebrides, where similar variation of the quality of the ground existed. That the notion of cavelling was still well known there is shown by the fact that when the low-lying land was reclaimed in 1632 and in part handed over to the "participants," they cavelled it out in strips among themselves, as being the best chance to secure fair chances for all.[88] The open-field system was in full force there as late as 1858.[89] At Haxey and Epworth many of the strips still exist. Some of them show the original narrow width, which has been modified at Laxton.

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[81] N.B.—How in the three-field arrangement all the arable gets manure at least twice in every three years, when the beasts are let in after "breaking." The defect of the infield-outfield one was that the infield alone normally got this benefit (Grant, *op. cit.*, 97).

[82] Maitland, *Archaic Communities*, *cit. sup.*, 344. The meadows obviously varied in quality. Hence the lot system continued. A yard-land was the unit of strips. As late as 1536–37 the burgh lands of Edinburgh were annually distributed by lot (*Acta Dominorum Concilii*, I, 63).

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[83] See Vinogradoff, *Growth of the Manor*, 174–9; Elton, E. H. R. I, 435.

[84] c. 42 (Schmid, *Die Gesetze der Angelsachsen*, 40).

[85] Orwin, *The Open Fields*, 165.

[86] Vinogradoff, *loc. cit.*

[87] Reade's *History*, 87, n. 1. For a Scots use of the term, see *Gray* v. *Richardson* (1876) 3 R. 1031.

[88] Stonehouse, *History of the Isle of Axholme*, 91 and map.

[89] The date of Reade. Probably much more recently (Orwin, *op. cit.*, 45).

Community landholding, then, in the sense in which it existed in Scotland, existed equally in England, but passed into individual ownership at an earlier date. Maitland's contrary view can no longer be accepted, in view of the evidence here put forward. It is to be regretted that he did not turn his attention to the Scottish examples, which throw much light on an admittedly obscure question in the history of English landholding and land law generally.

C. d'Olivier Farran.

PROPERTY IN RELATION TO MARRIAGE AND THE FAMILY

II. *The Isle of Man (continued),*

with a note of Evidence of Resemblances in Scottish Practice

E.—The Documents from 1499 showing Widowright, mainly in Personal Property. The earliest documentary evidence of the property rights in Man of husbands and wives and children consists of three statements preserved in the Statute Book: a decision on a case, a more general pronouncement, and an answer to a question. The first two balance each other and show that each of a married couple was understood to have a claim on a share of their joint possessions, which could not be lost through the misdeeds of the other; while the third shows the claim of the children on the share of a deceased parent.

The case is that of the wife of John Moore, who took her own life, or, in contemporary phraseology, " did perish herself." This was a felony and accordingly " such goods as belonged unto her," including " her part of the house," haggards or farm buildings, and beasts, were confiscated, and her young daughter, " the child that John Moore had by this woman," disinherited so far as "her mother's goods" were concerned, except, it is interesting to note, for some provision or gift allotted to her at her christening, described as " that which was given the said child at the font stone."

The date of this incident as given in the Statute Book would take the evidence it gives of the married woman's share of goods back to 1419, but rather disappointingly it seems to be a copyist's error. The names of the two Deemsters are given, Jenkin Moore and William Christian, and another document shows they were both still in office in 1504. In the Sloane MS. published in Vol. III of the *Manx Society*, the case of the wife of John Moore is dated 1499, which seems probably right. Much more information can be gathered of the circumstances of this family from the Sloane MS. than from the Statute Book. There was a doubt about the jurisdiction of the ordinary court, because the husband was a soldier and "the Constable alleged, by the privilege of the household, in so much as she was a soldier's wife, that this matter should pass by the Constable and Marshall and the Household." It was, however, decided by "the Deemster with the twenty-four" that "soldiers that bear 6d. farm or more to my Lord (*i.e.*, who are rent-paying householders) answer to the Law and the Country" (*i.e.*, to the same law as civilians), except, they added, for quarrels between soldiers. Judging from the haggards and the beasts, the couple held a croft or smallholding, which the man combined with his soldiering. That the house and farm buildings were divided as well as the personal property, and the part regarded as the wife's confiscated, is interesting. The house was presumably regarded as a cottage on an intack and therefore it and its haggards treated as chattels, according to a distinction set forth in later Manx documents.

The general pronouncement sets forth the same procedure of confiscating the share of the goods of a felon while leaving the share of the spouse untouched, when the felon is the husband. It is dated 1504 and runs :—"We find, if any forfeit his goods to the Lord by felony, his wife shall not forfeit her part of goods."

In neither of these judgments is the claim of man and wife each to a share of their joint property stated : it is taken for granted. In the third passage, the claim of a child to the goods of his dead mother in his father's lifetime is in like manner assumed in advance. The question is asked whether a man who has married for the second time can use towards the upbringing of his first family "anything . . . of their mother's child's part of goods." The reply is that he cannot. He can send them away with their goods when they are fourteen (regarded as years of discretion in Man) or let them stay on with him "if they do not demand their goods till they be twenty years old or upwards," but if he thinks "to stop a part of their mother's goods for their maintenance, he cannot do so."

The date of this question and answer seems uncertain; they are given in the Statute Book as part of a document called "The Merchant Stranger his Duty," dated 1523, dealing with the conduct of visitors coming to Man on business, to which it seems wholly irrelevant. It seems likely it was some time or other tacked on by a hasty scribe, in which case it may or may not properly belong to the same date.

Sir John Stanley's procedure when he visited Man was repeated a century and a half later by Henry, the Fourth Earl of Derby. We have in the Statute Book, under the title *The Book of the Customary Statutes of the Isle of Man*, the declaration, dated July 13, 1577:—"The whole Customs which were by my Lord his commandment put into writing by us his two Deemsters were proclaimed to be holden for Law at the Tynwald Day at St. John's Chapel, the day and year above written." The declaration which follows consists of thirty-five paragraphs, each beginning "We give for law," under the general heading: "Certain Old Customs given for law, which have never been put in writing, but held and allowed of long time heretofore." The first and twenty-fifth of these deal with widowright, while several others are concerned with children.

The document whose early history was set forth in the last article (under II*D*) was compiled very soon afterwards, under the title *A Book of the Spiritual Laws and Customs belonging to the Isle of Man*; it consists of sixty-one paragraphs. It may be found in the Statute Book, where it appears undated but immediately before the *Book of the Customary Statutes*.

The passages dealing directly with widowright in these two documents are the following:—

A. From the *Book of the Customary Statutes*, 1577.

(1) Also, we give for Law, that if any Man die, the Wife to have the one Half of all his Goods, moveable and

immoveable, and the Debts to be paid out of the Whole; and also the Wife to have the one Half of the Tenement wherein she dwelleth during her Widowhood.

(25) Also, we give for Law, that if any Man die, his Wife to have the one Half of his immoveable Goods, and the third Part moveable Goods, having Children; and if he have none, she ought to have the one Half of all the Goods, whatsoever it be, provided that the Church Duties be paid of the Dead's Part; and all the temporal Debts to be paid out of the whole Goods.

B. From the *Book of the Spiritual Laws and Customs* compiled before 1589, confirmed by representatives of the Head of the Temporal Power, 1610.

(5) Also that every Man and Wife which depart this Life upon the South Side of this Isle, do stand in one effect; that is to say, the Man to have one Half, and the Wife the other Half; provided always, that the debts temporal be paid out of the Whole, and the debts spiritual out of the Dead his Part.

(6) Also, upon the North side of this Isle, in case a Man or Wife depart this Life, having no Children or Issue, the Wife hath the one Half and may bequeath it to whom she will; and in like manner it is upon the South Side of this Isle; but in case there be any Issue or Children lawfully begotten, then if the Man depart, the Goods moveable are divided into three parts, *viz.*, one part to the Executors, another Part to the Dead, and the Third Part to the Wife; and of all Goods immoveable, not having any Life, the wife hath the Half on the North Side.

It will be observed that these documents differ in just the ways that might be expected from the differing jurisdiction of the civil and ecclesiastical courts. The Customary

Statutes include a right corresponding to dower or terce, which on Man was always a right to half and not only to a third of inherited land for the time of her (or his) widowhood. This was not the business of the ecclesiastical courts, and the Spiritual Laws do not mention it. On the other hand, with regard to personal property the Spiritual Laws are the clearer, and more explicit. They account for what looked like a contradiction of paragraphs 1 and 25 of the Customary Statutes by showing that one related to the South and the other to the North of the Island.

They also show that: (*a*) the law was the same for both sexes; it was not merely "if *any man* die" but "every *man and wife* which depart this life"; (*b*) it was a matter of joint ownership, not inheritance; the goods were recognised so definitely to belong part to the dead, or his or her heirs or assigns, and part to the living, that, whichever died first, the wife had the right to bequeath her part to whom she would.

No. 6 of the *Spiritual Laws* also explains the wife's third by treating the division as into three parts. On the other hand it indicates that the term "immoveable" here means "not having life," so that moveable property in this connection consists of live stock only.

There was no merging of property unless a marriage lasted a year and a day. This is set forth in the *Spiritual Laws* as follows: (10) "Also if any Man marry a Wife and the Wife depart [1] before a Twelvemonth and a Day, the Man can have none of the Marriage goods; in like Manner, if the Man depart before a Twelvemonth and a Day, the Wife can have no Part or Portion of his Goods, except it be given by Gift, or bequeathed by Will of either Party. If there be no Child or Testament made, then the Goods are to return to the next of Kindred."

About the time these Laws were put into writing the first other records bearing on the property of married people begin.

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[1] "Depart" in this and following statements means "depart this life."

In 1583 for instance it is recorded that a complaint had been brought by one, Thomas Edwardson, " against Ann Jameson for withholding from him the one half of one house and garden at Castletown." The terms in which the decision is expressed are of great interest : " The Deemster giveth for law that the husband cannot sett (let) or sell any part of the Living, which is their Stay, but by his wife's consent." In later years this was interpreted as applying only to real property, and Quayle's [2] gloss to this case runs " the husband cannot sett nor sell any cottages, houses, or any real Estate but with his wife's consent." That in normal circumstances however the disposal even of personal property needed the joint decision of the couple is suggested by a question asked in 1590 as to whether, when there has been a separation or divorce on the grounds of the wife's unfaithfulness, " the husband, after a composition between them that she shall not make title or claim to any of his goods and chattels, may give or grant any part of his goods and chattels by the Law of the Isle without the consent of his said wife from whom he was separated or divorced." This was permitted him, " having compounded with her " ;[3] presumably not otherwise at that date. Even when, three years later, by " My Lord's Resolution," which took its place in the Statute Book, a wife divorced for her adultery lost her right to " a moiety of such goods and chattels as her husband and she were seised of," she might still be given " so much as shall be decided upon . . . for her maintenance." The Court Records show that such a use of part of the property was in actual practice treated as the erring wife's due.

From 1600 onward, the manuscript records of the Episcopal and Archidiaconal Courts make the general procedure on the death of a married person clear. Sometimes the inventory is of the joint property of the couple ; sometimes it or an individual item is headed " his (or her) share of," or " the half of," or " the dead's part of." Except for the special treatment of " living goods " in the North of the Island, there is no difference in the general character of the wills of husbands and wives or in the kind of distribution carried out by the court on the intestate death of either.[4]

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[2] " Law Cases and Precedents," collected by John Quayle, Clerk to the Rolls, circa 1724 (*Quayle's Precedents*), Manx Museum MS.

[3] Liber Scacc. 1590.

F.—The Manx Child's Part of Goods. The passages in the *Customary Statutes* and *Spiritual Laws* respectively about succession to moveable property by children again cover a good deal of the same ground, a closer knowledge of administrative detail being revealed by the Spiritual Laws.

Customary Statutes, 1577.

(2) Also we give for Law, that if there be any Man or Woman that mislike their Children's behaviour the Parties making their Will before the Priest and Clerk, or sufficient Witnesses, that then if the Parties do bequeath to their said Children but 6d. they can claim no more for their Child's Part of Goods, except they die without any Will making, and then all the Children are Executors by the Law ; and if they make their Wills, they may give their Goods and make Executors whom they please.

Spiritual Laws, circa 1589.

(2) Also, everyone that dieth intestate, the Bishop or his Vicar General shall constitute and ordain his Children (legitimately begotten) to be joint Executors, provided always those being unmarried, and those that are married their Dowry cutteth them off from having any further Portion of Goods.

(3) Also, if any make their Testament and leave not 6d. Legacy unto their Children unmarried, (legitimately begotten) or the value thereof, that then the Ordinary may lawfully make him or her Executors with the rest.

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[4] Examples will be found in " Note on the Claims of Spouses and Children to a Part of Personal Property," *International and Comparative Law Quarterly*, April, 1953.

(7) Also, if either Father or Mother depart having Children, if the said Children be of Years of Discretion, that is to say 14 years of Age, they may divide Goods either with Father or Mother, and may repair to whom they will.

(9) Also, if either Father or Mother depart, having Children not come to Years of Discretion, being left Executors, and if any of them depart, the Ordinary shall make the rest, being alive, Executors; and in case all die under Age, then the Goods shall return to the Kindred next from whence it came.

Manx children could thus be cut off with sixpence. They could not, however, be disinherited merely by being omitted from a parent's will; they must have something, and they received their proportionate share unless 6d. or more, or goods to at least that value, were allotted to them. It has to be remembered that 6d. was a more substantial sum then than now. Even in 1702[5] it would buy two hens or ducks, six large lobsters, or six dozen eggs, and it went further still in the sixteenth century.

In intestacy and also under most wills, all the children were " executors," a term then meaning residuary legatees. This is clearly brought out by wills and other statements about individual cases. One mother, clearly of a defective son, having bequeathed her part of bought land so that " the profits thereof should go to maintain her son Richard while he lives," went on: " Item, she nominated and appointed her son Richard sole executor of all the rest of her goods moveable and immoveable, and for as much as the child Richard is not right in himself to make a right use of his goods, she left her sons John and William overseers over him." The court went if possible even further in appointing an executor who could not possibly act as such in the modern sense when, in 1695, it decreed in the case of a man who had died intestate, " his three children by a former wife, and the posthumous now in his wife's bearing, to be joint and sole executors."

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[5] William Sacheverell: *History of Isle of Man*, M.S.I., p. 13.

The dying parent, father or mother equally, could not only apportion his or her share of the property among the children (between whom the court otherwise made such distribution as it regarded as equitable) but also nominate " overseers " of the children, as has been already seen, frequently selecting relatives on his or her side. The income from the children's property might be spent on their maintenance, but not the capital, except in urgent need when permission might be given by the court for its sale. For instance, in 1607, the court consented that a widow " shall sell one parcel of Intacks being her Children's Right for the relief of herself and poor children having nothing else to maintain them withall." [6]

It might not always be immediately apparent whether there were kindred on the other side available to collaborate with the surviving parent. The court, while provisionally appointing the next-of-kin on the mother's side supervisors of a motherless family in 1695, went on " in case no relation appears, the court has given the administration to the father who is sworn to bring in a true inventory and to administer on the children's behalf according to law." In that case the mother had made a will and left her two children with their goods to the tuition and custody of her husband, " but the court regarded the will as imperfect in regard there is no legacy left to the children nor executors named."

A manuscript volume [7] entitled *Spiritual Laws*, opening with the early series but giving also later matter, indicates the procedure : " the Husband is to be sworn to be true unto the executors of the Wife, and the Wife unto the executors of the Husband." The charge includes the following words : " you shall be true to the executors or orphans committed to your trust and charge not to suffer them to sustain any loss or detriment so far as in you lieth, see the goods be priced to full value, and bring in a true inventory."

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[6] *Quayle's Precedents.*

[7] A particularly comprehensive version of this manuscript book apparently transcribed in 1740 for John Quayle (of the *Precedents*) is the property of Canon Stenning, who kindly lent it for the purposes of this inquiry. Other versions in Manx Museum, the earliest having apparently been transcribed in 1703.

The case is recorded for instance of a family of children with no paternal relatives to take an interest: "the father being an illegitimate child, therefore the wife hath taken the tuition of the children, and their goods . . . the wife sworn in form of law." A widow who preferred to bring up her children without the supervision of in-laws might, it would seem, regard her late husband's illegitimacy as a positive advantage! On the whole however the appointment of "overseers" from the other side of the family, which was for the safeguarding rather of the children's goods than of the children themselves, was no aspersion on the surviving spouse, was a customary provision in wills couched in terms otherwise suggesting affectionate and harmonious marital relationships, and might be a great help to a parent in preserving the rights of a first family in the face of a step-parent and a second family.

One mother, who had clearly been married and widowed twice, left to Sam Quayle, her son by her second marriage, "a quarter of the crop and a quarter of the house and declared that she ought (owed) him 19s. of his father's goods which she left to be paid him." At the same time she left her curse upon the overseers (presumably appointed by her late husband) "if they would not take care of Sam Quayle's tuition, and because they did not commit him to her son's charge." Earlier in the will she had insisted that Sam was not to be left to the care of his half-brothers.

The statement that married children are cut off by their dowry from any further portion of goods is qualified by a declaration recorded in 1675[8]: "If the Child or Children of a Decedent (though married) shall make to appear that at his or their intermarriage[9] he or they received not 6d or the value thereof from his or their parents in lieu of dowry or portion he or they shall then be made Joint Executors with the Children unmarried." The implication of the masculine pronoun that it was not only daughters who might receive a portion on marriage is borne out by records of cases.

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[8] Liber Episc, quoted in manuscript volume entitled *Spiritual Laws.*

[9] In John Quayle's copy the words "or after" are added with a reference to the same records for 1661.

That the court had great power of discretion is shown by a statement in the *Customary Statutes* of 1577 about the position of the child born out of wedlock: "Also, we give for law that a Bastard can have no Goods, except they be given him by Will or at the Discretion of the Ordinary upon Charity, otherwise they can have none by Law." The *Spiritual Laws* are more positive and say that such a child is "to be rewarded of charity at the discretion of the Ordinary."

G.—The Six Northern Parishes. It will have been observed that the wife's share is described in general statements as "a moiety." When in 1777 an Act was passed bearing on the widow's rights, they were described as amounting to half the moveable estate without qualification, the word *moveable* being used as equivalent to *personal*, as is customary elsewhere. It is necessary to examine wills or inventories to realise that the wife's share of *live stock* was in fact only a third in some Northern parishes right up to the eve of this Act, and that the term "moveable goods" bore there this narrow significance.

One of the earliest wills, that of Mrs. Joney Quail of Jurby, dated 1600, makes this last fact clear. It lists her possessions in two parts headed "moveable" and "unmoveable" goods respectively; and the former consists entirely of domestic animals, all the furniture and implements going into the latter.

It is noticeable that the total value of "moveable" and of "unmoveable" goods seem often to be given separately on the North side, though such a clear statement of the items in each is exceptional.

The alternative terms were "the living" and "the dead" goods, the latter including crops as well as furniture, tools, utensils, and clothing.

The amount of the part is not always clear because the most common term for the share of the spouse who has died is " the dead's part," though, even then, the proportion can sometimes be calculated, as the value in money is occasionally given of each individual animal, as well as of the dead's part of " fifteen sheep " or " three geese and a gander."

Bishop Wilson who was both a careful student and as head of the Spiritual Courts an experienced administrator, gives us the best definition of the scope of the exception to the general Manx division of goods into two equal parts. He says: " except in the six Northern parishes where the wife, if she has had children, can only dispose of a third part of the living goods." [10] There are seventeen parishes in the Island, the northern part as usually reckoned consisting of three of the six sheadings in which they are grouped, comprising eight parishes. The records seem however to confirm Bishop Wilson's statement and to show that the restriction of the wife's share of living goods when there are children to one third was confined to the six parishes in Michael and Ayre Sheadings.

It is harder to decide certainly whether the division of live stock there was ever into three parts as claimed in the Spiritual laws and as is characteristic of moveable goods in general in Scotland, the Channel Islands, and some other countries. On the whole the evidence seems to answer this in the negative. Bishop Wilson makes no suggestion of a three-fold division, and William Ross, a schoolmaster of his time, drew up a ready reckoner for " the North of this Island where the husband has two thirds of the living and half of the dead goods." The entries of " two parts of a cow " and the like in the inventories of husbands in the six Northern parishes are not all conclusive, since the clearest inventories often relate to cases of intestacy, in which the distribution is the same whether the executors or children have a third distinct from the dead's part or the latter amounts to two thirds. The proportion of the value of some items however shows clearly that the term "dead's part" is, sometimes at least, used of two thirds of live stock when the deceased is the husband, and there is nowhere any sign of any limitation in his power of bequest over this proportion, so long as each of his children has received 6d.

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[10] *History of the Isle of Man*, Bishop Thomas Wilson, 1722, M.S. XVII. In the account in the second edition of Camden's *Britannia*, which is based on this, the term used is " livestock."

The explanation may be that, though the spiritual courts, especially before the Reformation, were internationally-minded enough, and perhaps also balanced enough in their attitude to the two spouses, to assume that a division of 2 : 1 must be in intention and principle a division into three equal shares, actually this did not limit the husband's power of bequest. The form "one part to the executors" implies such freedom, since, as the second *Customary Statute* makes clear "they may give their Goods and make Executors whom they please."

Perhaps owing to this impulse to suggest a meaning in accordance with a principle and practice accepted in other parts of Christendom, this phrase "one part to the executors," which is found in all editions of the Statute Book, both manuscript (at least from 1676) and published, is altered in the various manuscript editions of the collected Spiritual Laws to "one part to the Children." If this is interpreted in the light of "if the Parties do bequeath to their children but 6d, they can claim no more for their Child's Part of Goods," so that it means "one part to those of the children who have not instead received a special legacy," it would in most cases be the equivalent of "one part to the executors," but not in all, as occasionally someone other than a child is nominated as one of the executors, notably the widow. However, the cases where there would in fact have been any difference in actual distribution between "one part to the dead and one part to the executors (or the children not nominated for a legacy)" and "two parts to the dead" must have been so few that it is little wonder if the three-fold division on Man was never more than a pious attempt at explanation, completely forgotten by courts and people alike; especially when it is remembered that only the smaller (usually) part of the goods in the smaller and less populous part of the Island was concerned.

The traditional story of the origin of the difference in the wife's share on the north and the south of the island regards the half-and-half division of all goods on the south as a privilege won by the women there "for assisting their husbands in a day of battle" as Bishop Wilson puts it. There appears to be no written account of this episode earlier than that given by Sacheverell in 1702 who tells us his authority[11] is "the Manx tradition." He calls the battle Stantway, but is clearly referring to Santwat, ascribed to 1098 in the Chronicle, which however only says the north obtained the victory and makes no mention of the women. Unlike some later writers, Sacheverell notes that the larger share of the women on the south regarded as a prize for helping to overcome the enemy is inconsistent with a northern victory, and argues that they may have turned the tide of battle in favour of the south. If so, it is strange the monks ignored the whole story in the Chronicle!

The vivid details added by writers since Sacheverell appear to be purely in the nature of embellishments. Nevertheless, though modern scholarship dates this battle in an earlier century, the tradition may suggest that the medieval Church Courts found—and did not introduce—this exceptional (for Man) division in the northern parishes, and that it had always been *in practice* an uneven division between man and wife to the wife's disadvantage, and not an even division between man, wife, and children. The chief grounds for supposing otherwise, besides the sixth Spiritual Law, is the equal division of all "dead goods" (real and personal) and of the living goods where there were no children. This last may have been introduced by the Church as part of her interpretation of the division as three-fold *in principle*, and so as only appropriate where there were children. No evidence has been found however to indicate whether the goods treated in this way were always only live stock, or came to be defined so narrowly from the impulse to reduce the inequality in practice, which was so out of harmony with the rest of the Manx outlook on the property of husband and wife.

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[11] His and subsequent statements, except Bishop Wilson's, are set forth by C. H. Cowley, in article "The Battle of Santwat," I. of M. N. H. & A. Soc., August 25, 1927.

H.—Widowright and the Land. Among the fragments of fifteenth-century Manorial books, referred to in the first article, one gives the name of Thomas Stevenson as holding Scarlet, and the next gives, for the same farm, " William Stevenson and the wife of the late Thomas Stevenson." Another entry shows us that William is the son of Thomas. Apart from such entries, which probably only indicate a few of the cases where the widow did in fact occupy the farm along with the heir, this being too much taken for granted to be always noted, the evidence for the share of the widow in " lands of inheritance " begins with the statement in the *Customary Statutes* of 1577 : " The wife to have the one Half of the Tenement (*i.e.*, holding) wherein she dwelleth during her Widowhood." This is followed in 1583, not only by the decision on the case of Ann Jamieson already quoted, but by the pronouncement about the sale of holdings on the Bishop's land, with the proviso " the wife's Right Reserved during her life " ; while two years later, apropos of another case, we find, " The Deemster giveth for law that the Bargain so made (*i.e.*, a sale of land) without the consent of his wife is void." [12]

A pronouncement of 1596 [13] seems to suggest that *either* the difference between widowright in inherited land and that in chattels *or* primogeniture in the inheritance of land was introduced after the period from which widowright in general derives. It runs as follows : " The Deemsters and Vicars General give for Law that the second wife is to have but a fourth part of the farm, if her husband had children by the first wife, if not to have half the farm during her widowhood." In any case where the heir was the offspring of the second marriage there could be no equitable reason for his only having to allow his mother a life interest in a quarter of his inheritance if he had half-sisters (with no claim on land), while she would have had a claim for half if her husband's first marriage had been childless. Nevertheless, Manx cases show[14] that this principle was accepted and widows whose husbands had been previously married and had issue by the first wife received as dower a life interest in a quarter only.

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[12] Lib.Canc. This and the following cases are found in *Quayle's Precedents.*

[13] Lib.Canc.

That the position with regard to inherited land could be puzzling even to contemporary Manx authorities is shown by a case which was decided in one way in 1636 and in another in 1648. An heiress married twice. The court decided on her second marriage that her son by her first husband, who was of course her heir, should succeed to half her estate when he reached the age of fourteen, presumably on the assumption that it had become the joint property of his parents on their marriage, when his father had paid the customary fine to the Lord, and that the father's half became the child's in his mother's lifetime. We can assume the the child was two years old at the time of this judgment. Twelve years later it was reversed; the mother and her second husband were charged to pay back the fine, presumably into the son's heritage, with allowance for the first husband's years of enjoyment, and then she was to "enjoy the whole for her lifetime." It was accordingly treated as her estate and not as the property of husband and wife jointly, like chattels, but the court only decided this on second thoughts.

A curious case was dated 1658. A woman went through a form of marriage with two successive husbands, both alive at the same time. On her oath that the first marriage was never consummated, the second was accepted as valid, but, presumably because the woman had taken upon herself the consequences of marriage in respect of property in going through the form with the first man, he was awarded half her landed estate for seven years, as well as half her goods permanently.

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[14] *The Advocates Note Book*, J. C. Bluett, Douglas, 1847, *e.g.*, p. 6 (*Case of* 1720) pp. 374–5 (1820).

Widowright in inherited land, as in chattels, was the same for widow and widower, or nearly so. It was noted in 1648 that a son had recovered from his father, who had married again, both " all that was his mother's heirship " and " her half of intacks purchased during her intermarriage with the defendant." The father had a widowright in half his first wife's heirship which terminated on his second marriage, while the purchased intacks, being reckoned as chattels and not as land of inheritance, belonged jointly to him and his first wife, and her half belonged to her issue after her death.

The position is stated by the Manx jurist, John Parr, as follows : " And it is the same with any man that marrieth an Inheritrix . . . the man retains a like benefit of a widowhood in the estate . . . such Inheritrix after she is married hath no power herself to set or sell any part of her Estate, without the free consent of her husband. . . . Neither can any man that is an Inheritor himself make any such disposal of his Estate, without his wife's consent, by the custom of the Island."[15]

The difference between the rights of a spouse in lands of inheritance and in chattels is made clearer by the accounts we have of what happened to each in case of felony. As already seen, chattels were divided, the innocent partner keeping his or her half and the felon's half being confiscated. There was however no division of inherited land, if husband or wife committed a felony, but instead the whole was treated as the sole property of the one of the married partners from whose family it came. The procedure is set forth by Parr as follows : " And if a man marry an heiress or a woman that is born to a farm and beget by her a son or a daughter, although the aforesaid man should after be convicted of felony or any other capital crime and be condemned for the same, yet shall his said son or daughter continue to hold the said farm and the Corbes belonging thereto, because the same descended from the mother who was free and not guilty of the said capital crime and the Lord is only interested in those and so much goods as are belonging into him that is convicted; . . . the children . . . only have property in the party that is free and not guilty."[16]

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[15] " An Abstract of the Laws, Customs and Ordinances of the Isle of Man," Deemster John Parr (*Parr's Abstract*), 1690. Manx Museum MS.

It was to the land which came from them that the respective families were most concerned to hold on, receiving it back ultimately if the marriage was without issue, since, (as the principle *paterna paternis, materna maternis* has been expressed in Man) " The blood from that line of ancestors from whom the estate did not descend can never inherit it."[17]

An anonymous writer argued with justification in 1650[18] that the heritable character of Manx farm lands is demonstrated by the existence of widowright therein. When in the sixteenth and seventeenth centuries the practice of granting land on terminable leasehold was introduced against the background of customary hereditary tenure and of customs appropriate thereto, such land too was subject to widowright at least for the term of the lease. Whether it outlasted the lease when this had been accepted by an old hereditary tenant is harder to ascertain certainly. If Manx custom was duly observed, every transaction, even between a tenant and the Lord or the Lord's representative, must have been qualified by " the wife's Right Reserved," and so the following pronouncement by a court in 1643 seems to imply :—" It is the custom that if any lease or composition happened to be taken in the viduity or widowhood of any widow, she is to be made liable to pay the moiety or half of the fine or composition money because she is to have the same benefit of widowright in the estate while she liveth or occupyeth the same, yet nevertheless, if the said widow happen to die before the expiration of the said lease, then her executors or administrators are to have a proportionate part of the fine compounded and returned again, computable to the term unexpired ; and the same course is to be held in case that any composition be taken or made in the time of the widowhood of a widower or husband of an inheritrix, if he happen to die before the expiration of the term compounded for as aforesaid."

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[16] *Parr's Abstract.*

[17] " Analysis of the Law of the Descent of Hereditary Property in the Isle of Man " by John M'Hutcheon, Clerk to the Rolls, published in Jeffcot's *Continuation of the Statute Book*, 1823, and (in quotation marks but with no reference to source) in *Manx Law Tenures* by Richard Sherwood, published in 1899, but written earlier (author died 1883).

A case of 1824 given by Bluett, illustrated by pedigree (pp. 398–401), shows how this principle was interpreted in the Isle of Man when the inheritor of *bought* land died childless and without brothers or sisters. Having been purchased by man and wife, it had come to their child from both lines, and accordingly half returned to each.

[18] *A Summary of the Antient State of the Isle of Man*, Manx Museum MS.

On December 10, 1643, the seventh Earl of Derby appointed Commissioners to carry out a wholesale conversion of all " his Honour's lands " by letting them " for the several Terms of three Lives, or 21 years," [19] and it seems probable the pronouncement was drawn up for their guidance.

The leases were presented to the tenants as advantageous, on account of their relative freedom from payments in kind, and perhaps, also, some easing of " carriage service," and for these boons the widow was expected to pay her share, part to be remitted to her executors if she died before the end of the lease. If, however, she outlived the lease, it seems to be assumed her widowright would continue ; otherwise she would have paid for her own ultimate destitution. Probably everyone concerned assumed that leases would usually be renewed, and the holdings remained to that extent hereditary and subject to the normal claims on hereditary land in the Island.

Land which is sold is on the other hand no heirship to the purchaser, not having come from his ancestors. Accordingly, like chattels, it became in Man the joint property of man and wife, to be divided and disposed of with the rest of the personal property, until this was modified by Statute in 1662. When it had once passed by succession it became land of inheritance. Land enclosed from the waste or common land, known as intacks, and cottages or mills built thereon, did not become lands of inheritance so quickly, unless they were " intacks of ease " adjacent to and incorporated in quarterlands whose tenants had enclosed them. An entry in the court book, dated 1666, runs as follows :—" The 24 Keys upon the trial of an action . . . for a parcel of Intack Land, declare it their opinion that the same is chattels and might be disposed of . . . having not passed three descents according as the Customs of the Country require." Quayle, who gives us this decision, says it is typical of a number round about that time. They are summarised as follows :—" farm lands or quarterlands which have so fallen one descent are to pass and go in the nature of lands of inheritance afterwards, but . . . such (*i.e.*, other than intacks of ease) mills, cottages, and intacks are to descend and pass three descents not reckoning the purchase or enclosure of them . . . but are to be reputed as chattels and bequeathable and dividable as other goods till then." [20]

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[19] Statute Book.

In consequence, widowright as of chattels and not widowright as of lands of inheritance applied to bought lands for the generation acquiring them, and to isolated or separately held intacks until the third descent thereafter.

While widowright in land was not for life, but for widowhood for both man and wife—*dum sola*, as it is expressed in Manx law—for the woman but not for the man it was also *dum casta*. Parr, when stating the husband's claim for widowright in his wife's land,[21] adds the condition " she dying having left lawful issue," and so introduces a further difference between his claim and that of the wife, which is reminiscent of *courtesy* in Scotland, and formerly in England, though that is and was conditional only on a child having been born alive. In the declaration of *Certain Temporal Customary Laws and Practices* in Quayle's copy of the *Spiritual Laws*, however, Parr's statement is repeated word for word, *except for the omission of this phrase*, either by the scribe's carelessness or by design.

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[20] Manuscript volume entitled *Spiritual Laws*, in section headed *Certain Temporal Customary Laws and Practices relating to Ecclesiastical Cases*, with reference to decisions of 1666 and 1668.

[21] *Parr's Abstract.*

Deemster Thomas Moore, in his statement to the Royal Commission visiting Man in 1791, calls the Manx widower "tenant by curtesy," perhaps because he was addressing Englishmen, but says nothing about offspring. Sherwood [22] also uses the word *curtesy*, but expressly says it does not depend in the Isle of Man on the birth of issue. Sir James Gell, in his notes to Sherwood's book says "the word *curtesy* is not commonly used in Manx records. The terms *dower* and *widowright* are frequently used with respect to the rights of a husband in the lands of his deceased wife." At the same time Sir James tells us of a case which had been decided against a childless husband; and seems to imply that if he had contested it he might have been successful. The probability seems to be that, just as in the Isle of Man the term *curtesy* was not used traditionally but occasionally, in imitation of England, so the Manx husband's widowright in land was traditionally no more conditional on there having been a child than that of the wife, but was occasionally assumed to be so through English example.[23]

I.—Children and the Land. The only reference in the *Customary Laws* of 1577 to succession in land is concerned with the child whose parents marry after, but not very long after, his birth. The passage runs: "Also we give for Law, that if a man get a Maid or a young Woman with Child before Marriage, and within a year or two doth marry her, if she was never slandered or defamed with any other before, that Child begotten before marriage shall have his Father's Corbe and his Farm according to the Custom of this Isle."

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[22] *Manx Law Tenures* (see note 17).

[23] The close resemblance may be noted between the conditions of Manx widowright in land and those of *freebench* under Kentish gavelkind (as set forth by Pollock & Maitland, Book II, Chap. 7, s. 2).

Seventeen years later, after Queen Elizabeth had taken Man under her government for the time being, the meaning of the passage was one of the " doubtful points in law " on which her representative, Randolph Stanley, Captain of the Isle of Man, asked the Deemsters and Keys to give him their " full Resolution." They then explained it in the following words : " If a Man get a Maid or young Woman with Child, and then within a year or two after doth marry her, we judge them to be legitimate by our customary Law."

The exact meaning of " a year or two " was never finally settled. A child whose parents married two years after his birth was accepted as legitimate but a suit for a heritage between two brothers, one born two years and nine months before, the other after, their parents' marriage, was withdrawn, through their reaching an understanding. In the lawyers' accounts of this case can be sensed a note of regret that family amity should have been achieved at the expense of legal elucidation ![24]

Neither the *Customary Statutes* nor the *Spiritual Laws* say anything about the claim of the eldest son to lands of inheritance. Paradoxically enough, the only general statement of this which found its way into the Statute Book did so as the direct outcome of the attempt to turn all the customary Manx holdings into leasehold.

It was ordained in 1645 by Lord Derby, the Council, Deemsters, and Keys, at the Tynwald Court, that tenants should not, on the strength of leases or any other grants or agreements, dispose of their lands " but according to the ancient and usual customary Laws of the Island, *viz.*, of Lands and Tenements called Farm Lands or Quarter Lands, and of Milns, Cottages and Intacks of Ease to such Farm Lands and Quarter Land, whereof the tenant or tenants now, by virtue of the said Commissions, have compounded for or hereafter shall compound for, and whereof they are or shall be possessed, interested, or estate by Descent of Title from his or their Ancestor or Ancestors, such . . . to descend and come (after the Death or Decease of such Tenant or Tenants) to his or their eldest Son, or for want thereof to his or their eldest Daughter, and in the Default of such, to the next of Kindred . . . except it be by Gift, Grant, or Assignment, in case of Poverty, or for or upon some other just Cause or Reason, and the same made known, approved and consented unto by the Lord of the Island or by his Lieutenant."

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[24] The (Isle of Man) Legitimacy Act, 1928, following the English Act of 1926, brought the time limit for the marriage to an end.

Though there is some reason to believe that in 1650, the year before his execution as a Royalist, the seventh Earl was considering a return to the acceptance of Manx customary tenure, called the Tenure of the Straw, the attempt to turn all tenancies into leasehold was continued by his successors, especially his son Charles, the eighth Earl, who exercised a dictatorial pressure on the Keys to make them accept terminable leasehold tenancies for themselves and others. During his time however, another Act was passed which assumed that land was bought and sold, and that bought land could be left by will, and provided that if not so disposed of it was, like the other land referred to in the Act of 1645, to "descend fall and come to the eldest son, and in default thereof to the eldest daughter, and in default of both to the next of kindred," but required the heir to repay the price (*of bought land only*) "unto the rest of the children unmarried and unprovided for."

As these Acts make clear, in the absence of sons, the eldest daughter is the heir-at-law on Man; there is no division of heirship among daughters.

One of the decisions quoted earlier referred to special heirlooms called Corbes, a word which probably comes from corpse or corse, since it is sometimes used for perquisites of the church authorities after a death, also called corse-presents. Corbes, special tools, weapons, and personal treasures, could be claimed by the eldest son and the eldest daughter. The first documentary account of them is in a statement in the Statute Book which, in the Sloane MS., bears the date 1521. Corbes for a man are there stated to include a pot or pan, bow and arrows, sword and buckler, his (the father's) best cup " if it be made of wood and bound about with silver and gilded with gold," and his best coffer. Corbes for a woman also include the best pot or pan, besides the best wheel and cards, the best beads of jet or else of amber, the best brooch.

An Act of 1643 declares that " whereas, when a man dies intestate, his Goods, by the Law, ought to fall to his children unmarried, equally amongst them, yet, contrary to this, the Church sometimes used to decree the whole team of oxen or crop of corn to the eldest son " and lays it down that thenceforward " any such decree in favour of the eldest son to the Wrong . . . of the younger Children . . . shall be void." The document in which the statement is made gives innocuous outlet in minor reforms to the anti-clerical temper of the people, who, at that time, as Lord Derby writes to his son, " by some damned spirit had been taught the same lessons as I have known in London . . . that they would have no bishops." [25] If however there were any tendency to give draught animals or other farm equipment to the eldest son, this may have been due to an extension of the idea of corbes, stimulated by the sense that he would need them on the farm. This was a point of view which often appealed to parents, and some of them also seem to have thought the corn should go with the land. For instance Katherine Fayle, in 1695, left " to her eldest son William Fayle, or whoever should happen to be heir, her part of the crop of corn, with her part of all other gears belonging to husbandry." A husband " left to his eldest son a team of oxen with all the gear of husbandry thereto belonging . . . whereunto his wife gave full and free consent." The needs of younger children were different and parents thought of them also. The following bequest by a father to his younger son Daniel lets us picture the widow, with her life interest in half the farm, living there with the heir, John, while Daniel has to make a living as a wage-earner: " to Daniel the profit of the land he had limed (presumably an intack) if his mother and brother John will not give him lodging and entertainment when he cometh to them, or when his master hath no employment for him."

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[25] M.S. III., 12.

A judgment is recorded in 1643 that the consent of the next-of-kin was not necessary for the sale of land, as though some assumed it were.

In 1703, " their ancient customary estates of inheritance " were declared and confirmed to Manx tenants by the *Act of Settlement.* Seventy-four years later, after the investment of the Island in the Crown of Great Britain, the Act of Settlement was confirmed with a preamble beginning : " The ancient Feudatory Tenures of the Isle between the Lord and his Tenants having in the Year 1643, by undue means, been changed into Leasehold Estates, the regular course of descent, which before had flowed in an easy uninterrupted Stream, was thereby clogged with difficulties not to be borne." . . . Nevertheless, the documents just considered seem to show that the stream flowed too strongly from its ancient sources to be completely clogged, even temporarily.

J.—Decline and Fall of Manx Widowright. The Isle of Man was purchased from the Duke of Atholl in 1765, the contract being carried into execution by the Act of (the British) Parliament always referred to in Man as the *Act of Revestment.* Twelve years later, Tynwald passed a group of Acts with a general preamble in the following words : " It being now thought expedient to repeal all obsolete and useless Laws . . . and to institute a new Arrangement and Connection of the most wholesome Laws, retaining every part possible of the ancient Constitution, and being made to bear the nearest Resemblance to the System of English Jurisprudence, which is conceived may greatly conduce to the Honour, Welfare, and Happiness of this Isle."

The Ecclesiastical Courts were not, as such, mentioned at all. Three Acts were passed, however, concerning matters falling wholly or largely within their scope: An Act to prevent Fraud and Imposture in the making of Nuncupative Wills, An Act for the Distribution of Intestates' Personal Estates, and, sandwiched between these two, An Act for Ascertaining the Interest of a Wife or Widow in the Estate of her Husband.

In 1791, the Bishop of Sodor and Man, and Evan Christian, Vicar-General, as representing the clergy of the Island, presented a memorial to the Commission then sitting. They claimed that the representatives of the Church had been excluded " in the years 1776 and 1777, when . . . laws were enacted materially affecting, or intending to affect, the rights and jurisdiction of the memorialists."[26] It would seem that the reference must be to the three above Acts.

The first of this group, while laying down more stringent conditions for wills by word of mouth only, indicates a general disapproval of deathbed wills in general. The third treats for the first time in Man the widow's half share as inheritance and directs that in intestacy the other half be divided in equal portions among the children, excepting any who have already received portions not less than their share. Failing children, their half is to go to the next-of-kin in equal degree and their representatives. The term used is simply *children*, not *legitimate* or *lawful* children, but it is always interpreted as so limited, and this Act is cited in the official Statute Book as having repealed the provision whereby a natural child might receive something " at the discretion of the Ordinary upon Charity," though it makes no direct reference to it.

The Act between these two leaves to married women their right to a half share of goods on their husbands' death, and still allows them to make wills in their husbands' lifetime, but now only in favour of their husbands or " the lawful issue of their body," who were still also to inherit in intestacy.[27] If a wife died intestate without issue her part now went to her husband.

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[26] M.S. XXXI., 161.

Examination of wills reveals relatively little immediate change. Wives and mothers continue to bequeath their goods to their children and an occasional bequest to someone other than a child, *e.g.*, a sister, still sometimes appears. But it is not long before we find the Appellate Court, representing the central Manx civil authority, called the Staff of Government, overturning judgments of the Church Courts in the interest of a sharper change from the past. Two judgments in favour of a woman's children by a former marriage were overturned in 1787 and 1794 on the grounds that there were no issue *of this marriage*, though this qualification does not appear in the Act. The occasion of the first had been an intestate death; the second involved the repudiation of a mother's will in favour of her two daughters by her first husband which the Church Court had accepted. A contemporary Island advocate, John Llewellyn, noted that these cases were on the same principle, but that the second was " still more in favour of the husband." [28] Until nearly the middle of the next century, the Church Courts were permitted to go on allowing a woman to make bequests to her grandchildren ; one will dated 1831 including such a legacy was published in the Journal of the Manx Museum for September, 1939. Later however the House of Keys cancelled a similar will on the theory, new to the island, that the term *issue* did not include grandchildren.

By then the assumption that Manx law should take example from English law was showing itself again. Lawrence Adamson, a member of the English Bar, seneschal of the Isle of Man, compiled in 1842 a pamphlet of 56 pages entitled " A letter to the Lord Bishop on the present state of the law of real and personal property in the Isle of Man as compared with that of England." He perceived vividly, but was far from admiring, the striking character of Manx law. He wrote: "It is still understood that the Act (of 1777) does not deprive the widow of her absolute right in half the personal estate and purchased land, and that consequently the husband has still only testamentary power over half thereof, if he dies before his wife. The consequence of this is that during the lifetime of the wife, no valid disposition of more than half his purchased lands, or even, as it should seem, of his personalty, can be made by the husband without his wife's consent, and his testamentary power is equally confined." In another place he pointed out that the Manx wife could do some things "as if she were a *feme sole*."

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[27] The statement on this point in the Note in the *International and Comparative Law Quarterly* for April, 1953, is inaccurate.

[28] *Advocate's Note Book*, pp. 338–9, 343–4.

Adamson acknowledged that in early times widows and children had in England been entitled to their reasonable share of personal property and that this was still the case in Scotland. Dower, in the sense of a life interest in land, was, he considered, well adapted to medieval conditions and just in principle, but "highly inconvenient" in the nineteenth century. He called attention to the English Act passed nine years before, whereby the widow's claim to dower might be defeated by the disposal of the land either in the husband's lifetime or by will.

Widowright was not then abolished in Man either in chattels or in land. An Act was passed however in 1852, of which Clause 4 runs as follows: "In case a wife dies before her husband, with or without issue of the marriage, her right to the goods and chattels, lands and premises, of her husband shall cease and determine and the same remain wholly to her husband." The use of the words "cease and determine" in this Act and in that of 1777 reminds us that even yet the wife, and also the husband, had an interest in the land of the other while both lived, which prevented it from being sold without the consent of the spouse.

In the same Act widowright in bought land was reduced from an absolute to a life interest, though not, like widowright in inherited land, only for widowhood.

There was now nothing that could be described as " the child's part of (personal) goods " in Man, except in so far as the father might feel himself bound morally, or by custom (not by law) to divide his property among his children. In consequence the Church Court no longer had the responsibility of seeing that the rights of motherless as well as fatherless children were respected and supervisors duly appointed. The father had become the sole authority. Even the provision that a child could only be excluded from his share by being mentioned by name and accorded a legacy of 6d. or more was abolished by an Act of 1869.[29] This also laid it down that " all real property of whatever description may be devised by will," though it was specifically stated that widowright as set forth in the Act of 1852 remained unaltered. Thereafter Manx wives could presumably legally bequeath their own inherited as well as their purchased lands, but an Act was deemed necessary in 1908 to remove doubts.[30]

There was no Manx Married Woman's Property Act in the nineteenth century ; it came later and then seems to have been passed in a hurry on the English model. In 1919 an address was delivered by Mr. Samuel Norris on *Women's Position in the Isle of Man* and a resolution was passed calling for an " Act for the Isle of Man, similar to the English Act of 1882 ; even if it involves altering the Manx law of dower-right." No reason was given why this should follow, but when two years later such an Act was passed, widowright in personal property was abolished therein, except for those already married at that time, and dower on land made subject to defeat by will, or by sale, for which the consent of the spouse was no longer to be necessary.

Some rights have since been allowed to spouses and children by the (Isle of Man) *Inheritance* (*Family Provision*) *Act*, 1938, but in untraditional form and with no historic continuity : a break between old and new for which the responsibility in England was incurred centuries ago, but in Man in 1921, when however the old Manx law had already been damaged, though perhaps not beyond repair, in 1777 and 1852.

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[29] Wills (Isle of Man) Act, 1869, s. 26, and Sched.

[30] Married Women's Real Property (Isle of Man) Act, 1908.

K.—A Note of the Resemblance between the Scottish and the Manx acceptance until the mid-nineteenth century of Distribution on the Prior Death of the Wife, and Scottish evidence thereof, especially from Testaments. As has been seen, the wife's right to leave her part of moveable property by will, and the right of her children to succeed if she died intestate before her husband, endured until and were abolished in the fifties of last century both in Scotland and in Man.

Wills and inventories in court records abundantly demonstrate these rights in Scotland as in Man and from an earlier date.[31] These show that at the very time Balfour asserted that a married woman could not make a will without her husband's authority, the first post-Reformation Courts which he was helping to administer (and all those thereafter till 1855) were accepting their wills to the extent of a third or a half of the goods according to whether there were children or not, and, if they died intestate, appointing executors dative for the preparation of testaments dative just as they did for men and unmarried women. There is no sign of any formal authorisation of a wife's will being needed: and it could only be very occasionally that a husband would have any motive to oppose it, *e.g.*, if a larger part than their equal share were diverted from his children to the offspring of the wife's former marriage. Personally he would not benefit by his wife's dying intestate, and he would lose the legacy she usually left him, and her children or other next-of-kin would receive all.

Though the great bulk of evidence begins at the Reformation, there is enough of earlier date to show the system was continued, not instituted, then. There are just under a score of cases in the records for the Edinburgh area from the first half of the century, including four of women of whom three are clearly married. These all date from about 1530. One of these is a testament dative, the two others wills, one of a third of the goods as there were children, the other of half as there were none. This last testatrix included among her legatees " my husband " as well as " my mother " and " my brother." [32] The pre-Reformation cases in the St. Andrews and Glasgow records are more numerous but some two decades later; they include many wills of married women. The first post-Reformation records show both wills and testaments dative in which the executor dative is not the husband, but, *e.g.*, the woman's son, daughter, or brother.[33]

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[31] Register of Testaments: Manuscript volumes and printed indices. In the Historical Department, General Register House, Edinburgh.

As an example of the general set-up of each individual statement may be taken a case of May 24, 1589. This is exceptional in two ways—in its description of the goods involved, and in the final destination of the " deid's part "—but otherwise it is in the usual form. It opens: " The Inventory of the gudes and gear of Christine Lambert *pertaining and possessed in common* between her and David Alison her spouse." After the money value of the contents is summed up, the debts set forth and subtracted, and the balance declared, the statement goes on " which being dividit into two partes, the part of the deid is—." Then " follows the deid's legacie and latter will." After all this elaborate reckoning-up and dividing, the testatrix left all to her husband, having, as she put it, " no bairns of her own procreated of her body."

The place of the Manx *Spiritual Laws* is in a sense taken in Scotland by the unanimous declaration by representatives from all over the country assembled in Provincial Council in 1420 that " the bishops had always confirmed testaments and appointed executors to those who die intestate," and that " it was the practice to divide the personal effects of the deceased into three parts." [34] There is also a letter from Andrew Forman, Archbishop from 1516 to 1521, to one of his parish priests : " we instruct you now and anew duly to warn the testamentary executors of those who die or decease, of both sexes . . . that . . . within nine days thereafter they produce . . . wills or inventories . . . and to certify the same that in the lapse of the said days we shall proceed to the appointment of executors dative."

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[32] Register of Testaments, Edinburgh Vol. IA, Scroll Testaments.

[33] Register of Testaments, Edinburgh, Vol. 1 *e.g.*, 38 (1567) 99 (1568), 128v. (1568). St. Andrews, Vol. II *e.g.*, 31v. 32, 36 (all June, 1582).

[34] Number 166, *Statutes of the Scottish Church*, David Patrick.

There is confirmation of the wife's part as beyond the husband's power on her death in his lifetime, in the temporary exemption of the books of ministers from inclusion therein during the Interregnum, by Act of the Scottish Parliament of 1644 : " Finding ministeres to be much prejudged that ther bookes in their owne lyftymes should fall in th^r^ wyves executrie. Therefore the said estates Liberate and exeems all ministers surviving th^r^ wyves from Confirming ther bookes in ther wyves Testaments and from Giving up inventor thereof."[35] But as has been seen, the clear evidence covers more than 100 years before this.

ANNE ASHLEY.

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[35] *Acts of the Parliament of Scotland*, I, 118, p. 195.

RECENT LEADING SCOTTISH CASES

By David M. Walker, M.A., LL.B., PH.D., Advocate

DILIGENCE—Poinding creditor's title to goods

Hopkinson v. *Napier* (1953 S.L.T. 99) was only just competent in the Court of Session: the sum at stake was only a matter of some £61 but the case raised a question of principle and was argued as such. A woman possessed certain furniture under a hire-purchase agreement: creditors in right of a small debt decree against her poinded the furniture and bought it at the subsequent sale. The true owners then claimed the furniture and the question arose whether the lessors or the poinding creditors were to be preferred. The answer, which seems manifestly fair and reasonable, was that the poinding creditors had and could have acquired no better title to the furniture than their debtor, the hirer, and they could not retain it against the true owners. Accordingly, one can only validly poind what is the unqualified property of the debtor and the creditor is always put on his inquiry in relation to subjects which may well be hired. The position of the lessor is similarly protected so that he may reclaim his property if it is poinded and removed from the possession of the hirer: he is not liable to have it abstracted from his lessee's house and sold for behoof of the latter's creditors. Such a course would be plainly intolerable. It is worth observing that the principle of this case and the basic authorities for it, such as Bell, Prin. S. 1315, cover equally the possible cases of a creditor poinding goods left with the debtor to be repaired or cleaned or pledged or lent. It would be a serious matter if every article left for repair were liable to be taken irretrievably by some unknown creditor of the repairer. The decision is accordingly of considerable general importance. Interesting questions of restitution and damages might arise if a poinding in such circumstances were followed by a sale to a bona fide third party taking for value and without knowledge or negligence. But it seems likely, standing this decision, that the vice affecting the poinding would continue to inhere in the goods so as to prevent even such a purchaser acquiring a good title to them. Such a view would be consistent with the attitude of Scots law in such other matters as market overt.

REVENUE—
Charity—Police sports meeting

When *Inland Revenue* v. *Glasgow Police Athletic Association* was before the Inner House (1952 S.C. 102; 1952 S.L.T. 136) it was observed (64 J.R. 61) that interest centred more on the question of the jurisdiction and competence of the Court of Session on matters of "charity" for income tax purposes than on the merits of the case. The House of Lords have now (1953 S.L.T. 105), by a majority, reversed that decision, holding that the recreation of members of the police force was a non-charitable purpose within the meaning of Schedule D. With that part of the decision there is little to quarrel but the observations of the House on the question of the competence of the Scottish court to deal with the law of charities in income tax law raises greater difficulties. The House held that, since *Pemsel's Case* ([1891] A.C. 531) the English law of charity has, for income tax purposes alone, to be regarded as part of the law of Scotland and not as foreign law. So far, so good, but what of this: "[The judges of the Court of Session] are technically not bound by the decisions of the English courts in the matter of charities and it is not improper for them to discuss or criticise English decisions. The Court of Session is not reduced to the role of an obsequious follower of decisions either of a judge of first instance or of the Court of Appeal, though it is only good sense to pay special regard and respect to the decisions and opinions pronounced by the English courts on a branch of the law built up by English judges, and familiar to them by long training and experience"? The Scottish Lords of Appeal present conceded that this doctrine presented the Court of Session with certain practical difficulties to surmount, and that the duty of surmounting them could now only be removed by legislation. But it remains to be seen whether those practical difficulties will not prove so great as to lead to chaos. The Court of Session is apparently, in a revenue appeal raising the issue of charity, to consider the very substantial tract of authority, not always consistent or readily to be reconciled, developed by Chancery judges on the foundation of an English statute of 1601, but not to be fettered in its consideration by the doctrines of precedent. How can this be squared with the difficulty and dangers, repeatedly pointed out, inherent in a Scottish court considering a tract of peculiarly English law? It is quite possible that the Court of Session would disapprove the *ratio* of a single Chancery judge or of the Court of Appeal, while the Court of Appeal or the House, with the advantage of a background knowledge of Chancery doctrine, would approve it. For example, in the Court of Session the view was expressed that the " army " cases (*Re Gray* [1925] Ch. 362; *Re Good* [1905] 2 Ch. 60, where gifts to regimental funds and an officers' mess were sustained as charitable, as conferring a direct benefit on the public) were, in their Lordships' view, very questionably charitable, but the same cases were approved by the House. It does seem, with all respect, that the House have done nothing to resolve the difficulty neatly focussed by the Lord President. The question, he said (1952 S.C. at 119) in such a case really is: What would the Chancery Division do? because without a competent knowledge of the English law of charitable trusts, and not merely a reading of the passages in English text-books and the cases there cited, the Scottish courts cannot properly perform the duty the House now seeks to impose on them. Such is the Gordian knot: the knife is in Parliament's hands in the shape of a statutory definition of charity in a Finance Bill. No doubt, as in the past, nothing will be done.

DAMAGES—Loss of support—Relevance of widow's private means

The House of Lords again disappointed in *Cruikshank* v. *Shiels*, 1953 S.L.T. 115. The point was simple: when a widow claims for solatium and loss of support in consequence of the death of her husband, is it relevant that she had a substantial private fortune available for her support? The House had no difficulty in affirming the decision of the majority of the Second Division that it was not relevant, but they conspicuously failed to do anything to elucidate the true basis of a claim for loss of support: is it to replace the support the deceased had been giving, or is it to ensure that the widow has support on at least the minimum subsistence level? The debate before the House, however, petered out in the argument whether the interlocutor of the Second Division unduly restricted the scope of the jury trial (which it was held it did not) and the interesting issues were side-tracked. It rather appears from *obiter dicta* that loss of support is to be assessed by reference to the amount of support in fact afforded in the past and likely to have been afforded in the future if the deceased had lived; but a proper discussion of the topic by the House would have been welcome. Had Lord Wright or Lord Macmillan been sitting, there would surely have been some observations of value.

DAMAGES—Review—New trial or partial new trial

In the discussion of *Leadbetter* v. *National Coal Board* (1952 S.C. 19; 1952 S.L.T. 179) in a previous number (64 J.R. at p. 164), doubts were expressed on the competency of the course there adopted of allowing a new trial for excess of damages *quoad* one only of several pursuers who sued together in a family claim for loss consequent on the death of the husband and father. These doubts have been justified by the decision in *Campbell* v. *West of Scotland Shipbreaking Co.*, where in precisely similar circumstances the court declined to follow *Leadbetter.* The importance of this decision is to emphasise the doctrine, most recently enunciated in *Kelly* v. *Glasgow Corporation*, 1951 S.C.(H.L.) 15, that when relatives such as widow and children sue for damages for the death of the breadwinner, they must all concur in one action, not merely to avoid a multiplicity of actions but to enable the court or jury to consider all their claims as inter-related family claims, and not as several individual claims. This view is consonant with common-sense as awards to, say, a mother and children will, in all probability, be used in effect as a single fund to maintain a home and clothe and feed the whole family. It seems unlikely that awards will ever be kept apart or banked and drawn on separately. From every point of view *Campbell* is to be commended and the *Leadbetter* heresy is thus early stamped out.

STATUTORY OFFENCE—Cumulative penalties

It is apparently inevitable that some individuals will seek to swindle the Welfare State and to enjoy a life of leisure at the expense of the community. Reprehensible conduct of this kind came before the court in *Maguiness* v. *Macdonald*, 1953 S.L.T. 158, but the legal interest arises from the fact that the panel was charged on a single summary complaint containing eight counts. The section of the National Assistance Act which made his fraudulent obtaining of benefit criminal provided the penalty of a fine of £100 and/or a maximum period of three months' imprisonment. The Sheriff-Substitute took the view that this applied to each offence and sentenced him to nine months' imprisonment. On this reasoning he might competently have sentenced him to two years' imprisonment and/or a fine of £800. On appeal this was held to be incompetent: the complaint libelled eight charges but the maximum period of imprisonment could be only three months as there was no sufficient indication in the Act of intention to overturn the general principle of Scottish criminal law that greater sentences than three, or exceptionally six months, require procedure by indictment. Moreover, the *cumulo* penalty for several offences competent under section 53 of the Summary Jurisdiction (Scotland) Act, 1908, is subject to the overriding limitations on the powers of the Sheriff sitting summarily, namely, three months, or in certain instances, six months. Nor were consecutive sentences competent without express statutory warrant.

RECENT LEADING ENGLISH CASES

By W. A. Elliott, M.C., B.L., Advocate, and of the Inner Temple, Barrister-at-Law

TRUST—Scheme to avoid taxation—Whether court can sanction.

The Chancery Division has a limited jurisdiction in certain circumstances to alter trust provisions in favour of persons who are or may become interested thereunder, and a limited power to sanction compromises. In *Re Downshire Estates, Marquess of Downshire* v. *Royal Bank of Scotland* [1953] 1 Ch. 218 the court sanctioned a scheme for striking out certain protective trusts where the persons *sui juris* had agreed upon such a rearrangement of their beneficial interests so as to save death duties, and all that was needed was the consent of the court on behalf of unknown or unascertained persons. The case is of interest in Scotland owing to the court's consideration of the view that it should not lend its aid or sanction to any proposed scheme whose principal object was to reduce liability to taxation. The court was of opinion, however, that this was no objection. Denning L.J. put the matter succinctly when he said (p. 136): " Just as people of full age and understanding are entitled so to arrange their affairs as to reduce the incidence of death duties on their successors, so also the court will permit the receiver of a lunatic to do it: *Re C. W. M.* [1951] 2 K.B. 714. If the court goes thus far, there is no reason why it should not give its consent to a scheme on behalf of infants for the like purpose. After all, the very object of the scheme is to benefit the infants, and the court, as their protector, ought to consent on their behalf unless it owes some overriding duty to protect the revenue, which I do not think it has." Of course, the practice of the Chancery Division is no precedent in Scotland, but the case appears also to raise a question of underlying principle which should surely receive the same answer in both Scotland and England—the United Kingdom being treated as one unit for taxation purposes. Should the courts refuse their sanction to schemes whose principal object is tax avoidance? In *A. & D. Fraser, petitioners*, 1951 S.C. 394, where a petition for the reduction of a company's capital was presented principally in order to avoid taxation, Lords Keith and Carmont categorically stated that the court could not be used as an instrument of tax avoidance and where it had a discretion to grant or refuse its sanction the sanction should be refused. In a strong dissenting judgment the Lord President said that the court should not use powers conferred upon it with a different object for the purpose of preventing any operation which reduced the applicant's tax liability. The case was never appealed to the House of Lords and, in any event, the considerations affecting company petitions may be in a different category to cases involving the interests of children; children being under disability their interests are usually paramount in the court's consideration and it can still be argued that the court may approve a scheme to avoid tax on their behalf when, if of full age, they could easily have done so themselves.

In a recent case in the Court of Session (so far unreported) the court ordered payment of large sums of aliment direct to two pupil children in an undefended divorce action and appointed a factor *loco tutoris* to receive the payments on their behalf. This was a departure from usual practice where payments of aliment are normally made to the mother on behalf of her children. Yet the new scheme was approved despite its main object being to avoid the aliment being counted as the mother's income for tax purposes. The circumstances in this case and *Re Downshire Estates* (*supra*) are indeed distinguishable from *A. & D. Fraser* (*supra*) but it is nevertheless submitted that all these cases still raise a question of underlying juristic principle. Provided a court of law has power to take a certain course of action or sanction a scheme in the interests of the individual and that course or scheme is legal and the procedure leading up to it has all been regular, it should be no objection to the court's approval that its main object is to avoid tax liability within terms of the Finance Acts. A court of justice has no overriding duty to the Inland Revenue any more than it has to the Administration. If it is desired to prevent the particular scheme from escaping tax, it is for the legislature to pass a new finance law.

PAYING GUEST INJURED BY FALL ON HOTEL DRIVE—Implied warranty to take reasonable care that premises are reasonably safe—Standard of care.

Bell v. *Travco Hotels, Ltd.* [1953] 1 Q.B. 473 illustrates the duties incumbent on an occupier of premises to those who enter under a contract. In these circumstances the occupier may be liable not only for negligence, if the entrant is injured through defects in the premises, but also for breach of an implied warranty to make his premises reasonably safe. In this case the plaintiff, a paying guest at the defendants' hotel, fell and suffered injuries while walking down the quarter-mile drive which was the only road for foot passengers to and from the hotel. She claimed damages first on the ground that the defendants had failed to warn her, an invitee, of an unusual danger on their premises; and secondly that they were in breach of their implied warranty (as laid down by McCardie J. in *Maclenan* v. *Segar* [1917] 2 K.B. 325, 332, following *Francis* v. *Cockrell* (1870) L.R. 5 Q.B. 184) to make the premises *as safe as reasonable skill and care could make them.* The trial judge found that some of the surface stones were slippery and therefore held that the defendants were in breach of this implied warranty as the slippery surface could have been rectified with reasonable skill and care. The Court of Appeal, reversing his decision, were of opinion that the dictum of McCardie J. could only be applied to the interior of the hotel and that the only warranty applicable to exterior premises was that laid down by du Parcq L.J. in *Gillmore* v. *London County Council* [1938] 4 All E.R. 331, 333, namely, to take reasonable care to see that the premises were in all respects *reasonably safe for the purpose for which they were to be used.* In this case the drive had only to be reasonably safe for foot passengers to walk on, and the defendants had taken reasonable care to see that it was. On the first branch of the plaintiff's case, based on tort, the court of course had no difficulty in deciding that the slippery surface was not an unusual danger within the rule in *Indermaur* v. *Dames.* There is no doubt now that the duty imposed upon occupiers towards those who enter their premises under a contract is higher than that towards persons entering merely in pursuance of some business or material interest common to both of them. It is therefore imperative that if an entrant can establish a contract to enter, he should found on the duty inherent in the implied warranty rather than upon tortious liability.

NEGLIGENCE —Invitor and invitee—Injury to window cleaner.

Window cleaners have featured prominently in the law courts recently and the decision of *Bates* v. *Parker* [1953] 2 W.L.R. 642 now falls to be read alongside *Christmas* v. *General Cleaning Contractors, Ltd.* [1952] 1 K.B. 191. It will be remembered that in the latter case the injured window cleaner succeeded in his action against his employers for failing to provide a safe system of working but failed to establish fault on the part of the occupiers of the premises whose windows he had been engaged to clean. The householder employs the window cleaner as an independent contractor and he is accordingly only liable for breach of the duties owed by an invitor towards his invitee. There was a speciality, however, in the case of *Bates* v. *Parker*, in that a single window-pane of plywood had an aperture in the middle which the plaintiff window cleaner used previously to hold on to and steady himself when cleaning the windows in question. Shortly before the accident the defendant occupier unbolted this plywood, without warning the plaintiff, and next time the latter tried to clean the windows the plywood moved when he tried to steady himself causing him to fall and suffer injuries. These facts were in Lynskey J.'s opinion sufficient to constitute an unusual danger of which it was the defendant's duty to warn the plaintiff, a duty in which the defendant palpably failed. There was no evidence that the defendant knew that it was the plaintiff's practice to rely on the plywood for support and the Court of Appeal accordingly did not have to decide what the result would have been if this practice had been known to him. On the established facts, however, the Court of Appeal were of opinion that the condition of the plywood was not an unusual danger to a window cleaner, who was here the particular invitee. Where the householder employs such an independent contractor to do work, be it cleaning or repairing, on his premises, the contractor must satisfy himself as to the safety or condition of that part of the premises on which he has to work. If the window cleaner had been injured by some defect in the premises of which the householder had knowledge and which had nothing to do with the work for which he was employed, then this might have been an unusual danger of which he should have been warned.

It should be noticed in relation to the previously considered case of *Bell* v. *Travco Hotels, Ltd.*, that " contractor " in that context does not include an independent contractor who is only an invitee in relation to the occupier. A person who enters another's premises by virtue of a contract, contracts regarding that actual entrance and usually pays for so doing.

SALE OF GOODS—Sale by trade description—Mistake by buyers and sellers as to meaning of description—Effect of mutual mistake.

A contract was concluded for the sale of 100 bales of " Calcutta Kapok, Scree brand " which unknown to both purchaser and seller contained an admixture of cotton rendering it unsuitable for use in the purchaser's machines. It was held that this did not constitute such a fundamental and mutual mistake of fact as to render the contract a nullity. Where the buyer mistakenly believed that goods of a known trade description had a particular composition, he had no right of relief in the absence of misrepresentation or breach of warranty by the seller. The fact that the seller might have entertained the same unexpressed but erroneous belief had no relevance when the rights of the parties came to be considered.

RECENT PRIVY COUNCIL CASES

" CRIMINAL BREACH OF TRUST AS AGENT ": Meaning.

Mahumarakalage Edward Andrew Cooray v. *The Queen* ([1953] A.C. 407) was the appeal, by special leave, from a judgment of the Court of Criminal Appeal of Ceylon, which had dismissed the appellant's appeal against his conviction, in the Supreme Court of Ceylon, on an indictment charging him with having committed criminal breach of trust between May 1, 1947, and April 30, 1948, in respect of a sum of money entrusted to him in the way of his business as an agent, contrary to section 392 of the Ceylon Penal Code. He was sentenced to five years' rigorous imprisonment. Section 392 provided: " Whoever, being in any manner entrusted with property, or with any dominion over property . . . in the way of his business as a banker, merchant, factor, broker, attorney or agent commits criminal breach of trust in respect of that property, shall be punished " as the section provided. The Board stated that they had first to determine whether the facts disclosed constituted a criminal breach of trust as agent, and, secondly, if not, whether there could and should be substituted a conviction for some other offence. It was held that before an accused person could be convicted of criminal breach of trust as an agent contrary to section 392 it must be established that he was a person who carried on an agency business, and that he committed the offence charged in the way of his business as such agent, and not merely that he acted in a particular transaction as a casual agent. In the present case their Lordships held that the appellant clearly was not carrying on the business of an agent. The appeal was accordingly allowed. But the Board were of the opinion that the appellant had plainly been guilty of a criminal breach of trust under section 389 of the Penal Code [" Whoever commits criminal breach of trust shall be punished with imprisonment . . . for a term which may extend to three years, or with fine, or with both "] of which a jury could have found him guilty in conformity with section 183 of the Criminal Procedure Code. The Court of Criminal Appeal, on their part, could under section 2 of the Criminal Appeal Ordinance have substituted a verdict of guilty under section 389 in place of that under section 392, and should have done so if, as their Lordships thought, the appellant had clearly committed an offence under the earlier section. The Board discharged the conviction under section 392, substituted a conviction under section 389 and imposed a sentence of three years' imprisonment less the period of time during which the appellant had been imprisoned under the conviction against which he appealed.

CEYLON CITIZENSHIP: Indian Tamils.

Govindan Sellappah Nayar Kodakan Pillai v. *Punchi Banda Mudanayake and Others* ([1953] 2 W.L.R. 1142) was an appeal from a judgment and order of the Supreme Court of Ceylon granting a mandate in the nature of a writ of certiorari quashing an order made by the second respondent that the appellant's name be included in the register of electors for the electoral district 84, Ruwanwella, for the year 1950. The issue for determination in the appeal was whether the Supreme Court were right in holding that sections 4 and 5 of the Citizenship Act, No. 18 of 1948 (the Citizenship Act), and section 4 (1) (*a*) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949 (the Franchise Act), were valid, or whether as contended on behalf of the appellant and as held by the third respondent (the revising officer) those sections were made in contravention of section 29 (2) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947.

Section 29 of the Ceylon (Constitution and Independence) Order in Council, 1946, as amended, provided: " (1) . . . Parliament shall have power to make laws for the peace, order and good government of the Island. (2) No such law shall . . . (*b*) make persons of any community . . . liable to disabilities or restrictions to which persons of other communities are not made liable. . . ." The Citizenship Act provided, inter alia, that a person born outside Ceylon was to have the status of a citizen of Ceylon by descent if his father and paternal grandfather or his paternal grandfather and paternal great grandfather were born in Ceylon. By the Franchise Act (as amended in 1950) a person who was not a citizen of Ceylon was not to be qualified to have his name entered or retained in any register of electors.

On January 22, 1951, the appellant filed a claim to have his name inserted in or retained on the register of electors for the Ruwanwella electoral district, and in a letter averred that he was a resident in the electoral district and had been so resident for a continuous period of over six months in the eighteen months immediately before June 1, 1950; that he was, and had at the relevant period been, a British subject; that he was in no way disqualified to be an elector; and that his name had been included in the register prepared for 1949. On February 26, 1951, the first respondent, as assistant registering officer, held an inquiry into the appellant's claim. In oral evidence the appellant said (inter alia): " I was born in British India. Both my parents and all my other relations were born in British India. All my wife's relations are in India except my brother-in-law who lives with me. I have not sought registration under the Citizenship Act or under the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949. I do not own any property in India . . . I do not own any property in Ceylon either." The first respondent rejected the claim " as the claimant is not a citizen of Ceylon within the meaning " of the Citizenship Act " . . . I accept the statements of fact made by the claimant before me at this inquiry."

The appellant filed a petition of appeal to the revising officer and, by an affidavit, he deposed (inter alia): " The vast majority of the present Indian immigrant population came to Ceylon long after the year 1852, and though a large number of the members of the community have been born in Ceylon yet their parents were not born in Ceylon. In the case of the Indian community, unlike in the case of the Singhalese and Ceylon Tamil communities, the fathers of the persons who belong to this community have not been born in Ceylon as immigration of Indian labour commenced only in 1852. Hence the Ceylon Citizenship Act, while it confers the status of a Ceylon citizen on all members of the Singhalese and Ceylon Tamil communities, fails to confer that status on by far the vast majority of the members of the Indian community settled in Ceylon."

The revising officer held the Acts in question *ultra vires* on the ground that the Citizenship Act was in no true sense legislation to create the status of citizenship, but was, with the Franchise Act, part of a legislative plan to reduce the electoral power of the Indian community. The Supreme Court quashed the order of the revising officer.

It was contended on behalf of the appellant before the Board that the Citizenship Act and the Franchise Act made persons of the Tamil community, of which the appellant was a member, liable to a disability or restriction within the meaning of section 29 (2) (b) of the Constitution Order-in-Council, and were therefore *ultra vires.* It was conceded for the appellant that those Acts did not on their faces discriminate against the Tamil community, but it was argued that they indirectly had that effect, since a large number of Tamils could not become citizens of Ceylon because neither their fathers nor their grandfathers were born in Ceylon. The Board held that the Citizenship Act was, in pith and substance, legislation on citizenship, and that that Act and the Franchise Act did not intend to, and did not, impose disabilities on Indian Tamils in Ceylon to which other communities were not liable within the meaning of section 29 (2) (*b*) of the Constitution Order-in-Council, and that the Acts were, therefore, *intra vires.* It was a perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals. Standards of literacy, of property, of birth or of residence were, as it seemed to their Lordships, standards which a legislature might think it right to adopt in legislation on citizenship, and it was clear that such standards, though they might operate to exclude the illiterate, the poor and the immigrant to a greater degree than they excluded other people, did not create disabilities in a community as such since the community was not bound together as a community by its illiteracy, its poverty or its migratory character, but by its race or its religion. The migratory habits of the Indian Tamils were facts which were directly relevant to the question of their suitability as citizens of Ceylon and had nothing to do with them as a community. The legislative plan in Ceylon looked at as a whole, however, indicated that the legislature did not intend to prevent Indian Tamils from attaining citizenship provided that they were sufficiently connected with the Island. By the Indian and Pakistani Residents (Citizenship) Act, 1949, an Indian Tamil could by an application obtain citizenship by registration and thus protect his descendants, provided he had a certain residential qualification. The appeal was dismissed.

CROWN PROPERTY: Sale by auction: Authority.

Attorney-General for Ceylon v. *A. D. Silva* ([1953] A.C. 461) was an appeal from a judgment and decree of the Supreme Court of Ceylon setting aside a judgment and decree of the District Court of Colombo whereby an action which the respondent instituted against the appellant (as representing the Crown in Ceylon) for the recovery of Rs. 40,000 as damages for breach of contract was dismissed. The Supreme Court held that a valid contract had been made and awarded the present respondent Rs. 40,000 by way of damages. The Principal Collector of Customs, acting for and on behalf of the Crown, advertised in the Government Gazette certain goods for sale by public auction, which took place on March 4, 1947. The respondent said that he purchased the goods, the subject of the action, at the auction, and that the Principal Collector thereafter wrongfully refused to deliver the goods. The appellant contended that there had been no contract binding on the Crown and prayed that the action be dismissed. The property in question consisted of certain naval war supplies—the greater part being a quantity of steel plates—which were lying on customs' premises in Ceylon, along with other goods belonging to various units of His Majesty's forces. The Principal Collector, by mistake, treated the goods as "unclaimed cargo." Several attempts to get the services to remove the goods proved unsuccessful, and on December 24, 1946, the Principal Collector obtained the sanction of the Chief Secretary to sell them. At the sale by auction on March 4, 1947, the respondent was declared the purchaser of the goods now in suit. The basis on which the Collector held the sale was that warehouse rent was due on the goods under section 17 of the Customs Ordinance (ch. 185, Legislative Enactments of Ceylon), and that as they had been left on the customs' premises for more than three months they were liable, under section 108 of the Ordinance, to be sold after public advertisement. Meanwhile, the Ministry of Supply in Britain had appointed an officer of the Services Disposal Board to take charge and dispose of the goods. That officer, after receiving offers from various people, contracted to sell the goods to a firm on January 23, 1947.

The precise question for the decision of the Board was whether the Principal Collector had authority to enter into a contract binding on the Crown for the sale to the respondent of the goods in question. The matter was considered under two heads: Had the Principal Collector actual authority to enter into a contract? If not, did he have ostensible authority to do so? Section 3 of the Interpretation Ordinance (ch. 2 of the Legislative Enactments of Ceylon) provided: "No enactment shall in any manner affect the right of the Crown unless it is therein expressly stated, or unless it appears by necessary implication that the Crown is thereby bound." Their Lordships said that the Customs Ordinance did not expressly state that the Crown was to be bound thereby, and that the question therefore arose whether the Crown was bound by necessary implication. They held that neither the provisions of the Ordinance nor the schedules contained anything from which it could be inferred that the Crown was bound by the Ordinance by necessary implication.

Accordingly, the Ordinance did not bind the Crown. It had been argued that, apart from the Ordinance, the Collector had actual authority to do what he did, and that that authority was reinforced by a letter to him from the Chief Secretary. It was, their Lordships said, a clear proposition that a public officer had not, by reason of the fact that he was in the service of the Crown, the right to act for and on behalf of the Crown in all matters which concerned the Crown. The right to act for the Crown in any particular matter must be established by reference to statute or otherwise. It had not been shown that the Collector had any authority to sell property of the Crown or to enter into a contract on its behalf for its sale; nor had it been shown that the Chief Secretary, who authorised the sale, had any such authority. His functions were defined by the Ceylon (State Council) Order-in-Council, 1931, and by that Order the most that could be said was that he was authorised to deal with certain Crown property under the direct administration of the Government of Ceylon. It was therefore clear that the Collector had no actual authority to enter into a contract for the sale of the goods now in question.

On the issue of ostensible authority, all "ostensible" authority involved a representation by the principal as to the extent of the agent's authority, and no representation by the agent as to the extent of his authority could amount to a "holding out" by the principal. No public officer, unless he possessed some special power, could hold out on behalf of the Crown that he or some other public officer had the right to enter into a contract in respect of the property of the Crown when in fact no such right existed. Their Lordships thought that nothing done by the Principal Collector or the Chief Secretary amounted to a holding out by the Crown that the Collector had the right to enter into a contract to sell the goods in suit. There was accordingly no ostensible authority to sell.

The goods, the subject-matter of the action, had been treated so far without reference to the sale to the firm on January 23, 1947. The date on which the property passed from the Crown to that firm, their Lordships said, could not be gathered with confidence from the evidence, and there was no evidence that the firm did not pay or did not offer to pay warehouse rent. But even if the property passed on January 23, 1947 (it could not have passed earlier), and the firm paid no warehouse rent, still the Collector had no right to sell the goods on March 4, 1947, because the period between those two dates fell short of the three months prescribed by section 108 as the period after which alone goods might be sold for non-payment of warehouse rent. The sale to the firm did not therefore alter the fact that the Collector had no authority to sell the goods.

The judgment of the Supreme Court proceeded largely on the basis of an admission which the Solicitor-General was said to have made to the effect that section 17 of the Customs Ordinance applied to the Crown. Before the Board there was some discussion as to the extent of the admission. Assuming, however, that the Supreme Court rightly understood the admission, their Lordships could not be bound on a question of law by an admission which, in their opinion, would involve an erroneous construction of the Ordinance. The appeal was allowed.

CURRENT PERIODICAL LITERATURE

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EVIDENCE OF SIMILAR FACTS

Perhaps the most difficult task which can face a presiding judge at a criminal trial, it is observed in a note on *Harris* v. *D.P.P.* [1952] 1 All E.R. 1044 in the *Modern Law Review* for October, 1952, is the admission or rejection of evidence of " similar acts " by an accused person. The principles governing the admissibility of such evidence were defined by Lord Herschell in the leading case of *Makin* v. *Att.-Gen. for New South Wales* [1894] A.C. 65, and so far as they go, are well established. 1. It is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those with which he is charged, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. 2. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before the court, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged were designed or accidental, or to rebut a defence which would otherwise be open to the accused. Lord Herschell went on to say that the statement of general principles was easy, but that it might often be very difficult to draw the line and decide whether a particular piece of evidence fell on the one side or the other. Subsequent cases have showed not only that this is true but that it is open to debate whether Lord Herschell's principles are adequate.

In particular, it has been doubted whether prima facie such evidence is inadmissible, subject to certain exceptions, or whether the broad rule is in favour of admissibility, unless the sole effect of the evidence would be to show criminal propensity. Again, Lord Herschell's principles have been interpreted as meaning that evidence of similar acts can only be led in order to rebut a defence already put forward in substance, if not in so many words. Thus, according to a much-quoted dictum of Lord Sumner in *R.* v. *Thompson* [1918] A.C. 221 at p. 232, " The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of evidence." In *R.* v. *Sims* [1946] K.B. 531, however, the Court af Criminal Appeal expressed the view (at p. 539) that " If one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view." Evidence was not to be excluded because it tended to show that the accused was of bad disposition, but only if it showed nothing more. There must be specific features connecting the evidence with the crime charged, as distinct from evidence that the accused was of bad disposition.

It seemed to some that *R.* v. *Sims* had settled this debatable question and provided a uniformly applicable test for all cases in which it might arise. But it was not long before the Privy Council disapproved of the view quoted above and laid down that both the nature of the defence and the facts and circumstances of the particular offence charged should be considered before evidence of similar facts was admitted. Now Lord Simon, giving the leading opinion in the House of Lords in *Harris* v. *D.P.P.*, has gone most of the way back to *R.* v. *Sims.* " The substance of the matter appears to me to be that the prosecution may adduce all proper evidence which tends to prove the charge. I do not understand Lord Herschell's words to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal . . . what Lord Sumner meant in *Thompson* v. *R.* when he denied ([1918] A.C. 232) the right of the prosecution to credit the accused with fancy defences was that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause." But, in emphasising that evidence of similar facts should not be allowed unless it has " a really material bearing on the issues to be decided," Lord Simon added a second proposition, namely that, if the strict application of the rule as to admissibility would operate unfairly against the accused, the judge should intimate to the prosecution that the evidence though admissible should not be pressed, because its probable effect would be out of proportion to its evidential value. Lord Simon left it studiously vague what " proper " evidence means, but presumably it is evidence that is relevant and otherwise admissible in law. Evidence of similar facts is " improper " then if it shows only that the accused is of bad character or has a propensity to commit the kind of crime with which he is charged, but is " proper " if there is some reasonably plain *nexus* between the facts in issue and previous acts of, or circumstances affecting, the accused.

Writing on this subject in the *Law Quarterly Review* for January, 1953, Mr. P. B. Carter points out that, though Lord Simon's second proposition is a gloss upon, not a solvent of, the purely legal rules, and while the same view has been judicially expressed in previous cases, it amounts to a fresh approach by which an answer to the problem is not sought exclusively, nor even perhaps, primarily, in a set of well-defined rules of law capable of detailed formulation and suitable for automatic application, or in fact in rules of law strictly so-called at all. For this reason " the decision will, if conscientiously followed, constitute a milestone in the development of the law."

Harris' Case in fact represents an abandonment of attempts to discover workable rules which courts may follow in deciding to admit or reject evidence of similar facts, beyond the general principles established by *Makin's Case*. It has been found impracticable to limit the introduction of this type of evidence either by proposing a general rule of exclusion, admitting of certain exceptions, or by making its admission conditional upon a certain kind of defence having been put forward. The decided cases are of illustrative value merely, and the fairly numerous judicial dicta since *Makin's Case* have done more to obscure than to resolve the problem. It is to be hoped that *Harris' Case* will not add to the controversy but will, if not put an end to, at least diminish it. Whether Lord Simon's second proposition is quite as valuable as Mr. Carter and others think may be doubted.

Everyone recognises that evidence of similar facts is peculiarly prejudicial and dangerous. It is not likely, therefore, that the prosecution will normally seek to adduce it unless it has " a really material bearing " on the charge. Indeed, to do so otherwise would be two-edged, since it might appear to the jury unfair and help the defence. On the other hand, it is probably very seldom that the evidence, if truly relevant, will be of such minor importance that it should be excluded in the interests of justice. A court may well hesitate to allow an old hand to get off on an impudent defence when evidence that is clearly admissible under *Makin's Case* might convict him. The great difficulty is to decide, not whether evidence of similar facts would be more prejudicial than evidentially valuable, or less, but whether it is relevant or not to infer guilt, and this is a matter which obviously must depend on the circumstances of each particular case, and in which the discretionary power of the court to exclude unfair evidence can be of no assistance.

Substantially the same considerations apply to evidence of similar facts in Scotland as in England. In *H.M. Advocate* v. *Joseph*, 1929 J.C. 55, the principles enunciated by Lord Herschell in *Makin's Case* were adopted by Lord Murray in Lord Herschell's words, although the Australian case was not expressly referred to. It is stated to be a general rule, however, of criminal practice in this country that evidence in the course of a trial tending to prove the accused guilty of another crime not libelled is not to be admitted (*Macdonald on Criminal Law*, 5th ed., p. 307). Thus Lord Justice Clerk Aitchison observed in *H.M. Advocate* v. *Griffen*, 1940 J.C. 1, at p. 5, " If in order to prove the substantive crime libelled it is thought necessary by the Crown to prove the commission of some other crime that is relevant to the crime substantively charged, or to the motive for committing it, then I do not doubt for a moment that notice ought to be given in the indictment by setting forth the subsidiary crime in the form of a charge." But this rule seems to be rather too broadly stated and not to apply to evidence of similar facts, or of " system " as it is usually called in Scotland. Thus in *Gallagher* v. *Paton*, 1909 J.C. 50, a case of fraud, and *H.M. Advocate* v. *Ritchie & Morren* (1841), 2 Swin. 581, a case of coining, evidence of previous attempts to commit the same crime was admitted without notice, and in *H.M. Advocate* v. *Kennedy* (1907), 5 Adam 347, on a charge of murder, evidence was allowed of previous assaults by the accused upon the deceased without their being charged. The reason for the rule being fair notice to the accused, it is not of the same importance when the previous acts of the accused were of a similar kind as when they amounted to crimes of an entirely dissimilar character, although connected with that charged. The reason why no such rule exists in England is probably that the question of fair notice does not arise, since there the depositions of prosecution witnesses taken before justices are available to the defence. It may be partly for the same reason that English criminal charges are usually much less detailed. They could not be so bare if the accused did not know before his trial the case that would be made against him. In this respect English criminal procedure has perhaps an advantage over ours, which is in some ways no doubt to be preferred.

THE BASIS OF VICARIOUS LIABILITY

Mr. G. J. Hughes and Mr. A. H. Hudson, of University College, Hull, have an interesting article in the *Canadian Bar Review* for January, 1953, on " The Nature of a Master's Liability in the Law of Tort." They point out that, although it has long been established on grounds of expediency and convenience that in some circumstances one person should be liable for an act of another, no convincing statement of the theory of the doctrine has been agreed on. " The matter seems never to have received the notice of a court of high authority, and a clear schism can be perceived in the views of learned writers on the subject." According to some authorities, the very term " vicarious liability " is fallacious. In considering the liability of a master it is not necessary to ask whether his servant has or has not committed a tort. The rule is simply that certain acts and states of mind of the servant are imputed by law to the master. According to the other view, a master cannot be made liable for his servant's acts unless the servant himself is liable, with an exception in that an employer may be liable to a husband or wife for acts committed by the other spouse, although the spouses cannot sue each other. Until very recently it was possible to take the view that even this exception did not exist. That cannot now be said in England since the decision of the Court of Appeal in *Broom* v. *Morgan* [1953] 1 Q.B. 597, where the tenant of a public-house was held liable to the wife of the manager for injury caused to the plaintiff by her husband's negligence in leaving a trap door open. But the wider question still seems to be open, though in *Broom* v. *Morgan* Lord Goddard L.C.J. in the court below and Denning L.J. in the Court of Appeal expressed views in favour of the independent liability of the master.

Professor Kahn-Freund in a note on the case in the *Modern Law Review* for July, 1953, regards it as laying down that a master becomes liable if his servant acts negligently in the course of his employment, whether or not in so doing the servant commits a tort. By " acting negligently " he means acting carelessly in violation of a moral duty recognised by law. On the other hand, an editorial note in the *Law Quarterly Review* for July, 1953, while agreeing that the rule ought to be what Professor Kahn-Freund says it now is, takes the view that *Broom* v. *Morgan* has merely decided that a master's liability is not affected by the disability of spouses to sue each other for tort. The latter seems on the face of it to be the more correct reading of the decision.

Messrs. Hughes and Hudson think that the law may be stated thus: A master is liable in tort for the act of his servant, if the servant's act was a breach of a duty imposed on the servant by the law of tort, and was done in the course of the servant's employment; the fact that the servant enjoys an immunity from action does not protect the master. The master's liability, therefore, may in certain circumstances, be divorced from the servant's liability, but this does not mean that the master's duty is independent of the servant's duty. No duty can logically attach to the master through the servant unless there is a duty on the latter, and so before the master can be made liable the nature of the servant's act must be examined. If there is no breach of duty on the part of the servant the master cannot be liable. But the mere fact that the servant is immune from action need not affect the master's position.

There is a certain difficulty in this proposition arising from the fact that the rule by which spouses are disabled from suing each other in tort is a rule (in Scotland, as in England) not merely of procedure but of substantive law, derived from the fiction that husband and wife are in law one person. The difficulty, which troubles Professor Kahn-Freund and the writer of the note in the *Law Quarterly Review*, is perhaps a somewhat academic point. It made no impression on the judges in the Court of Appeal. But apart from that, can the law of vicarious liability be summed up so neatly and comprehensively? It is tempting to think so; yet a doubt remains.

Let us take two hypothetical cases which Messrs. Hughes and Hudson mention rather than discuss. They have to be hypothetical, it should be observed, because there is no case law except where husband and wife are concerned. (*a*) A servant in the course of his employment commits an otherwise tortious act in a sudden fit of insanity; (*b*) a minor servant similarly commits an act which would be accounted negligent in an adult but is not negligent in him because of his age. Is the master liable in these cases? The answer of Messrs. Hughes and Hudson seems to be that in (*a*) there is a prima facie tortious act by the servant, though he may raise a defence to negative his liability, at least when his insanity was such that he could not appreciate the nature and quality of his act (see *Morriss* v. *Marsden* [1952] 1 All E.R. 925). Consequently, his employer is liable. In (*b*) on the other hand, there is no tort at all, and so the employer cannot be made liable.

It is hard to see what the basis of the distinction between the two cases is, or the precise meaning of the term "prima facie tort." If it is true that in case (*b*) there is no negligence, because in order to be capable of acting in breach of a duty to take care a person must be able to appreciate the need to take care, surely the same argument applies to case (*a*). In both cases there is quite a lot to be said for holding the employer liable. The law of vicarious liability of an employer is founded apparently on practical grounds of public policy. Consequently, provided that a servant occasions injury to a third party in a manner that attracts liability in law, and provided also that the act was committed in the course of the servant's employment, should the injured party suffer because of the agent's incapacity? Granted that it is anomalous to make the master liable at all when the servant himself escapes liability, why confine the responsibility of the master to cases where there is a duty laid on the servant by law and he is only immune from action? If the master chooses, or has the misfortune, to employ a servant who is subject to fits of insanity, and *a fortiori* where he chooses to employ a minor, should the injured third party be worse off than if the servant were sane and an adult? It may be admitted that, as Messrs. Hughes and Hudson say, " it would be socially inexpedient and legally nonsensical to hold a master liable for harm done by a servant for which the master could not be sued had he done the harm himself." But that is another matter.

They also appear to be justified in criticising (in a subsequent note in the *Canadian Bar Review* for March, 1953) the ground of decision adopted by Denning L.J. in *Broom* v. *Morgan*, namely, that the duty of a master is nothing but a duty to see that his business is properly and carefully done. This may be in a general way the effect of the rule of vicarious liability, but as a statement of the rule it is surely too loose and would only open the way to new uncertainties.

It seems questionable, however, whether there must invariably be a breach of duty on the part of the servant in order that the master may be made liable. Would it not be better to say that, if the servant has a good defence, then his act must be such that the master would have been liable had he done the act himself? Or, perhaps, the statement suggested by Messrs. Hughes and Hudson might be amended to read as follows: A master is liable for the torts of his servant committed in the course of the servant's employment, and also for any acts of the servant in the course of his employment for which the servant would be liable in tort but for the operation of a rule of law excluding the servant's liability on the ground of his incapacity or immunity from action. That would cover the case of an insane or minor servant causing injury, without being in breach of a duty himself, as well as the case of a servant causing injury in circumstances in which the servant was in breach of duty but was immune from action. But it may be preferable not to attempt to define too correctly the scope of the exceptions to the normal rule that a master's liability depends on that of his servant. This is a new twig on a branch of the law of tort, and its future cannot be safely predicted.

Periodicals also received: *Documentation Juridique Étrangère* (Brussels), *Textes Législatifs Étrangers* (Brussels), *Oklahoma Law Review*, *The Medico-Legal Journal*, *Revista Jurídica de la Universidad de Puerto Rico*, *New York University Law Review*, *The Western Political Quarterly*, *Italian Affairs*, *The American Journal of International Law*, *Jus* (Milan), *Revue Internationale de Droit Comparé*, *The International and Comparative Law Quarterly*, *de Derecho* (Valencia).

RECENT LITERATURE

The British Cabinet System. By Arthur Berriedale Keith, D.C.L., LL.D., D.LITT., F.B.A. Second Edition by N. H. Gibbs, Fellow and Tutor of Merton College, Oxford, and University Lecturer in Modern History, 1952. London: Stevens & Sons, Ltd. Price £1 17s. 6d. net.

The British Constitution is notoriously difficult to describe. The conventions and practices which are the Constitution have to be selected from a mass of historical precedent. Important precedents are often discoverable only from press reports or private correspondence. Even society gossip may be a vital source of authority for the constitutional lawyer.

The unsystematic nature of his sources makes it difficult for a writer to support his views by authority without becoming tedious. He can seldom cite an officially reported judgment and must instead refer to an incident from which a principle may or may not be deducible. For instance, on Bonar Law's resignation in 1923 the King did choose Mr. Baldwin and not Lord Curzon to be the new Prime Minister. The *ratio* of the royal decision is not known, yet the fact of the King's choice is usually taken to illustrate a new constitutional rule that the Prime Minister must sit in the Commons. The arguments concerning such well-known incidents are quite interesting and intelligible to the ordinary reader, but when the author seeks authority for his views on the removal of ministers he must refer to the careers of Mr. Ayrton and Lord Carlingford. The ordinary reader may be excused if he has forgotten the details which alone make the argument intelligible or if he is unwilling to make the necessary researches to refresh his memory.

However, in spite of pages which are not very readable, Mr. Gibbs's revision of Berriedale Keith's work has produced a valuable and up-to-date account of the British Cabinet system. Generally, the views expressed are cautious and undogmatic. It is refreshing when the author's strong personal opinions do emerge, as they do in favour of proportional representation and against Scottish Home Rule.

These opinions appear in what is probably the most interesting part of this book. The authors having traced the development of the Cabinet reach this conclusion that so much power is now concentrated in the hands of Cabinet Ministers, and particularly of the Prime Minister, who may not even represent opinion in the country, that some limitation of Cabinet authority may be desirable. "There is in theory a very great danger in the misuse of power by a ministry with a distant mandate; that it has been avoided in the past may be assigned to that essential moderation, which is the chief political asset of the British people. But whether that moderation will endure is uncertain."

In this connection the authors seem to favour the retention of a Second Chamber but to have no views of their own on its composition. They also discuss possible innovations. Of these they favour two:

proportional representation in order to obtain a more accurate index to public opinion, and the appointment of all-party Parliamentary committees to co-operate with ministers in administration and in the drafting of proposals for legislation. They believe that these changes would not produce the defects of the French system provided financial initiative remains with the government.

Devolution, regional or functional, as a means of limiting Cabinet power is dismissed on practical grounds. Scotland and Wales are favoured as theoretically suitable devolutionary units. Home Rule for Scotland, however, is regarded as impractical mainly because it is not really wanted in Scotland. The chief reason for this is said to be that Scots are not convinced that they would be better governed by the Glasgow Irish than by the London English.

The authors do not think it probable that effective measures will be taken to limit the authority of the Cabinet, since each government is naturally unwilling to reduce its own powers. In consequence they seem to foresee the possibility of a situation, such as Shaw depicted in *The Applecart*, in which the Sovereign might again be in a position of vital importance and be called upon to save the people from its government. It is certainly consoling to know that the Crown is ever present to use its great influence to restore that essential moderation which is the only real safeguard of any constitution. The Union of South Africa has recently given an example of the absence of the essential moderation and it is interesting to speculate whether that might not have been avoided had the royal influence been as immediate there as it is on ministers in London.

The British Cabinet System is an excellent textbook, but it finds little room for speculation. In his preface Mr. Gibbs says that " there is much to be said for a new approach to the history and working of Cabinet government, based on less formal and institutional grounds than those adopted by Keith and most other standard writers on the subject." The reader may well regret that Mr. Gibbs did not himself adopt such a new approach instead of confining himself to a revision of Professor Berriedale Keith's traditional work.

H. F. FORD.

A History of English Law. By Sir William Holdsworth, O.M., K.C., D.C.L., HON.LL.D. Volume XIII. Edited by A. L. Goodhart, K.B.E., Q.C., D.C.L., LL.D., and H. G. Hanbury, D.C.L. 1952. London: Methuen & Co., Ltd. Price £3 10s. net.

This thirteenth and penultimate volume of Sir William Holdsworth's monumental history of English law appeared seven years after his death. Before he died, however, Sir William had collected substantially all the material for the thirteenth volume, which, except for two insertions by the editors, is accordingly presented as the author's own work. The material for the fourteenth and final volume of this great and comprehensive survey had, we are told, reached an advanced stage of preparation before the author's death; but the editing of this volume will cast a heavier burden on the literary executors, to whom the author has committed this responsible and weighty task. It is fortunate indeed that this trust has been confided in Dr. A. L. Goodhart, Master of University College, Oxford, and Professor H. G. Hanbury, who occupies the Vinerian Chair of English law at Oxford. Drawing on exceptional learning and editorial skill in marshalling the vast quantities of material prepared by Sir William, they are further fortified in their task by their devotion to the memory of a very great scholar and Englishman.

There is another memory which these volumes will serve to keep alive while the history of English law is studied—the memory of Flight Lieutenant R. W. G. Holdsworth, sometime Stowell Fellow and Dean of University College, Oxford. The two final volumes of his life's work were dedicated by Sir William Holdsworth to the memory of his son "who was killed in the war to defend his country and civilisation from the innate and incorrigible savagery of the German people." Tragic indeed have been the losses to British legal scholarship which two great wars have inflicted, notably that of the younger Holdsworth. Yet even greater had been the loss to the common law had its leading exponents been content to discuss the rule of law in academic seclusion, without taking up the sword of justice in its defence. A very different conclusion to the history of the English law might have resulted.

The volume under review covers the period from 1793 to the Reform Act of 1832, and continues the theme of Book V (opened in Volume X) "The Centuries of Settlement and Reform." *In limine* the very learned author examines "The New Ideas and the Old," ranging over a wide field—and rightly so, for the impulse towards reform of the law and the determination of those resolved to oppose change in the law were only aspects of more general philosophies of life. The political and economic background of the period is then examined, and thereafter the movement for reforms in law. Even before the Reform Act, 1832, reform of the law was increasingly made the concern of legislation, and, appropriately enough, a considerable part of Volume XIII is devoted to the "Enacted Laws." Legislation was, of course, the method of reform which Bentham considered virtually exclusively and universally applicable. The personality and influence of Bentham, indeed, are always in the background, and frequently in the foreground of discussion; but Sir William, while awarding merit where due, does not hesitate to criticise the errors and extravagances of that great reformer and his disciples.

A most valuable survey is given of the Law Reports, of the Literature of the Law, and of the leading legal personalities of the period under scrutiny. In discussing these personalities Sir William makes a number of observations of particular interest to Scottish lawyers—who will note that the period covered by the thirteenth volume coincides with that described in most of Cockburn's writings. Discussing Eldon's Act, which foisted on Scotland civil trial by jury, the learned author (p. 605) seems to share the view of a good number of Scottish lawyers from 1815 to the present day, that this measure was "of doubtful utility." In the judicial biographies of several who practised before, and/or adjudicated in, the House of Lords one finds a good deal of corroboration for the submissions of Professor Dewar Gibb in *Law from Over the Border* as to the suitability of that august tribunal, especially in the early nineteenth century, to determine the civil law of Scotland. One may admire Eldon's conscientiousness, but some of Brougham's utterances regarding Scottish appeals are thoroughly offensive. The sources of a good number of the ideas expressed and reforms urged by Cockburn himself are fully discussed and examined by the learned author. It is possible that the enthusiasm of some Scottish Whig lawyers in the early nineteenth century for such reforms might have been modified at least, had they understood the state of English law as Sir William presents it at the beginning of that century. It is difficult, for example, for any lawyer not educated in the English law to comprehend the great gulf fixed between common law and equity, which was then virtually so impassable that a Lord Chancellor trained in the one branch of the law of England was deemed scarcely capable of understanding and operating the other with success—Erskine being a case in point.

It is with humility that a Scottish lawyer in particular must view this great contribution of one outstanding scholar. We still await our Holdsworth. The whole volume under review is a repository of immense learning, yet so lucidly and attractively written that, having taken it up, the reader (be he lawyer or layman) will be reluctant to put it down. Here indeed is a work which commends itself, not only to the present generation, but also to posterity. For the present reviewer as an individual to recommend it would be almost an impertinence.

T. B. Smith.

The Constitutional Law of Great Britain and the Commonwealth. By O. Hood Phillips, M.A., B.C.L.(OXON), Assisted by G. Ellenbogen, M.A. 1952. London: Sweet & Maxwell, Ltd. Price £2 2s. net.

This book contains a most comprehensive and modern survey of the Constitutional Law of Great Britain and the Commonwealth. One is impressed at once by the efficiency of the book. The law is stated clearly and concisely. Where it depends on statute, the statute is given. Where it is based on a judicial decision, the case is given. Where it depends on historical events or practice, these are given. There are frequent and illuminating references to the provisions of other Constitutions and to the opinions of various writers from Aristotle to Dicey and his successors. There is little theorising. So abstract a subject as the Rule of Law is explained and discussed in a few pages.

The general characteristics of the Constitution, Parliament, the Crown, Central and Local Government, the judicial system and the rights and duties of the citizen are all dealt with. Among the more modern developments the judicial powers of administrative authorities and the legal liability of public authorities are discussed. The author regards the lack of system as the fundamental criticism of the administrative authorities and he suggests the desirability of an Administrative Appeal Court analogous to the Judicial Committee of the Privy Council rather than to the Court of Appeal.

The book also contains a section dealing with the British Commonwealth. The Colonies, Protectorates and Trust Territories are dealt with in considerable detail. There is a chapter on Dominion status with a discussion of the Statute of Westminster and the subsequent changes. Canada, Australia, New Zealand and South Africa are each dealt with separately. The original Constitution under the Act incorporating each is described and the subsequent developments are traced.

There is a brief history of India from the time of the East India Company up to the creation of India and Pakistan in 1947, and the Constitution of the Republic of India is described.

This is an excellent textbook which can be warmly commended to all who wish to study Constitutional Law.

E. J. Keith.

Leading Cases in Constitutional Law. By O. Hood Phillips, M.A., B.C.L. (OXON). 1952. London: Sweet & Maxwell, Ltd. Price £1 15s. net.

Sooner or later the student of Constitutional Law must pursue his studies among the many decisions of constitutional importance enshrined in the *Law Reports*, but these are not always easy of access to him and the earlier reports may not be available. This book meets his needs. Here gathered together in one volume are extracts from over 100 cases covering a wide range of subject and period and including everything that the student is likely to want. According to the preface the cases have been selected for their educational value; some as being new statements of principle, some as being sources of subsequent development, others because they review lines of previous decisions and others again for their historical significance. The selection amply confirms this claim. Among the earlier cases one finds, for example, such famous examples as the *Shipmoney Case* and the case of the *Proclamations*. Less well known, but interesting, is the case of *Rex* v. *Brown*, in 1841, where Brown was indicted and found guilty of refusing to assist a constable in the execution of his duty in quelling a riot. Among the later cases the *Mersey Docks Case*, *Bradford Corporation* v. *Myers* and *Zamora* all find a place. The modern cases include the case of *Joyce*, where the law of treason was discussed, and *Liversidge* v. *Anderson*, where the House of Lords could not agree on the meaning of such apparently simple words as "If the Secretary of State has reasonable cause to believe."

The method of treatment is to name the court which decided the case, to summarise the facts and to give a verbatim extract more or less complete from one opinion. In some cases short extracts are included of other opinions, and in some cases dissenting opinions are given. The subjects dealt with cover the whole scope of Constitutional Law even to such matters as the right of a judge to hear a case in camera.

There are references to the author's book on Constitutional Law, and the two books, which are thus supplementary, together give a most comprehensive survey of the whole field.

E. J. Keith.

The Dominion of Ceylon. (The British Commonwealth—The Development of its Laws and Constitutions—Volume 7.) By Sir Ivor Jennings, Q.C., LITT.D., LL.D., Vice-Chancellor, University of Ceylon, and H. W. Tambiah, B.SC., LL.B.(Lond). 1952. London: Stevens & Sons, Ltd. Price £2 15s. net.

This is the third volume in the series to be published, the two already published being about Australia and India. The aim of this book is to present a survey of the legal institutions of Ceylon with their historical background in such a manner as to interest readers in the island and elsewhere.

The first part of the book is devoted to the constitutional history of the island from the time when it came under the British Crown in 1798. Its development through the status of a Crown colony to fully responsible status and its present constitution are fully described. The advance from government by a Governor-General in Council to Dominion status is familiar to students of the British Commonwealth, but in Ceylon the process did not follow the usual pattern. With people of different races and religions Ceylon presents in miniature some of the problems which were present in India and its advance resembles in many ways the advance of India, yet the fully responsible status which it ultimately attained and its place within the Commonwealth have more in common with the former self-governing dominions than with India.

The second part of the book deals with the courts of law of which there is a great variety, and the third part gives a general survey of its laws. There are chapters on the Law of Persons, Property and Obligations, Criminal Law, Kandyan and Muslim Law, Thesawalamai and Mukkawa Law. Few countries can have so complicated a system of law as obtains in Ceylon. There are four inherited systems: Roman-Dutch, Thesawalamai, Islamic and Kandyan. A fifth, the Mukkawa, has disappeared. For more than a century English law has been predominant and has moulded the laws of the island to its form. Here and there are doctrines familiar to the Scots lawyer. Marriage by habit and repute is recognised. An action of damages for the death of an individual caused by negligence is granted to all who had a legal claim to support from the deceased. Reparation is based more commonly on negligence than on nuisance. Here and there familiar doctrines are slightly altered, but who shall say whether for better or for worse? Thus, while there is no distinction between slander and libel, truth alone is not a defence, but it must further be proved that the statement was made in the public interest.

For anyone wishing to study the laws and constitutions of Ceylon this volume is an admirable survey. But in Scotland its main interest will be to those who are interested in the constitution of the Commonwealth and therefore of Ceylon as part of it and to students of comparative law who will find much to ponder.

E. J. Keith.

Select Legal Essays. By Sir P. H. Winfield, Q.C., F.B.A., LL.D. With an editorial preface by S. J. Bailey, Rouse Ball Professor of English Law in the University of Cambridge. 1952. London: Sweet & Maxwell, Ltd. Price £1 17s. 6d. net.

Comprised in this volume are seven essays on the law of tort, three on contract, three on quasi-contract, and two on public policy and ethics. The learned editor deserves congratulation on the presentation of these essays in readily accessible form. It may possibly be regretted that it was not found practicable to supply a full statement of Sir Percy Winfield's written work. The essays collected in this volume have long been recognised as outstanding contributions to English law, and it would be redundant to stress their value to those whose main concern is with the Anglo-American common law.

So lucid and penetrating is Sir Percy's style, that on rereading the essays on tort the reviewer was moved to regret that they have not been resorted to sufficiently by those responsible for arguing and deciding upon the Scottish law of reparation—especially in the Supreme Appellate Tribunal. Distortion during the twentieth century of the Scottish law of quasi-delict—which was formerly and is still in theory based on broad principles—seems to be substantially due to the over-ready concessions of counsel, and the ready assumption of the judges, that the law of Scotland and of England in such fields as negligence, *Rylands* v. *Fletcher*, liability for dangerous premises and the like is or should be identical. A classic example of this was the concession made by counsel (none of whom were qualified to speak as to the law of England) that *Donoghue* v. *Stevenson*, 1932 S.C. (H.L.) 31, fell to be decided on the assumption that the Scottish and English law applicable to the case was the same. In the limited sense that under either system the pursuer might be entitled to succeed, this concession is admissible. On the other hand, had learned counsel been familiar with Winfield's essays, and aware of the conflict raging in England at that time as to whether or not there was " a tort of negligence," or as to whether there was a " law of tort " or a " law of torts," they might well have hesitated to venture any opinion whatever on the English law. The unfortunate consequences of their concession are only being realised as the limits of the so-called doctrine of *Donoghue* v. *Stevenson* have to be defined in subsequent judicial decisions. It is unreasonable to expect Scottish counsel to speak with confidence as to the law of England in the House of Lords, but, as in practice they are invited in the House of Lords to commit themselves, they would do well by a perusal of Winfield's essays to forewarn, and therefore to forearm, themselves against any facile assumption that, though Scottish and English law might each grant a remedy on the facts, therefore Scottish and English law are the same. This point might be illustrated in many aspects of the law of tort. It may be sufficient to observe that after considering the brilliant essays of Sir Percy Winfield (collaborating in one case with Professor Goodhart) on the specialities of the English law of negligence, it is difficult to justify the superimposition on the Scottish law of *culpa* of the formalised English categories of duties owed by occupiers of property and of dealers in dangerous or potentially dangerous things.

Again, the alien concept of " particular duty " in reparation actions founded on negligence was established in Scots law about half a century ago, and its introduction is clearly derived from English sources which scarcely seem relevant to the law of Scotland. Roman law and Continental law have no need of such a concept, nor apparently is it material in the field of contributory negligence. In considering this doctrine Winfield's essay on " Duty in Tortious Negligence " makes clear that the concept arose from specialties of the English common law. We may infer that it has no real place in a system which recognises no law of individual torts, but broad principles of *culpa*. Sir Percy (pp. 84 *et seq.*) contends that the element of " particular duty " derives from a certain confusion of thought which originated in the " privity of contract " cases—and the decision in

Donoghue v. *Stevenson*, while liberating the law of negligence from the consequences of the *non-sequitur* involved in these cases, nevertheless perpetuated the concept of " particular duty." At p. 97 the learned author summarises his argument as follows: " In the first half of the nineteenth century contract and tort were slowly being disentangled, and negligence had gradually come into existence as an independent tort (in addition to retaining its old meaning, of a mode in which a wrongful act might possibly be committed). In the process of separating contract from tort and in the development of the tort of negligence, a confused notion about *assumpsit* became the germ of the duty idea. It was thought that, as *assumpsit* in contract always showed an ' undertaking ' of liability, therefore, liability in tort must show something equivalent to it, *i.e.*, ' duty '; and the older cases in which *assumpsit* was a blanket that covered both contractual and delictal liability were cited to support this." It may well be wondered (though the position is now past praying for) why such a concept was ever allowed to intrude into the Scottish law where contract and reparation had long been established on quite separate and rational bases. The light which Sir Percy shines on this problem now serves only to show us where we have taken the wrong turning. It is too late to retrace our steps now in this respect, but if we regard the learned author's clear signposting of the progress of the English common law, we may avoid going astray in other fields through an overwillingness to identify English and Scottish law.

The essays on tort deal mainly with doctrines which are, or were, peculiar to the Anglo-American common law—though, as has been observed, they have influenced Scottish law in some respects. In the contract section of Winfield's Essays the essay on " Some Aspects of Offer and Acceptance " (p. 157) deals with problems on a somewhat wider basis, and reference is made to Continental and to Scottish law. This contribution to legal thought is indeed most valuable. A Scottish lawyer might well consider whether Sir Percy's preference for defining contract by reference to " promise " rather than to " agreement " is not well justified—though a different view commended itself to Gloag. The whole essay claimed and claims close attention, but one small point is particularly worth mentioning for the benefit of Scottish lawyers. (It illustrates, incidentally, the learned author's attention to detail in checking his sources.) At p. 176, dealing with the question as to whether a display of goods with prices marked thereon in a shop window constitutes an offer, reference is made to the view expressed by Gloag (*Contract*, 2nd ed., pp. 21–22), that it does not—on the authority of *Campbell* v. *Kerr* (1810) F.C.(N.S.)I. 596, February 24. In a footnote, however, the very learned author of the essays states that he cannot trace in the report the passage referred to by Gloag. The reviewer must agree with Sir Percy.

In fine, this collection of essays requires no commendation to the Anglo-American common lawyer. The power and lucidity of these contributions to legal thought have long been recognised by scholars, practitioners—and indeed by the judges. It may be legitimate, however, to recommend this collection of essays to those reared in a different system of jurisprudence, which is yet indirectly affected by the English common law. That law is a technical law, and its subtleties are not always to be grasped from a mere perusal of the

English *Law Reports*. In Winfield's Essays, however, there is to be found clearly and attractively explained much of the common law which a man of lesser skill might scarcely have made intelligible. The Editor's selection is admirable.

Since this review was written Sir Percy Winfield has passed from us after a long and useful life. In Scotland as in England we mourn the loss of yet one more of a great generation of legal scholars of genius.

T. B. Smith.

Palmer's Company Precedents. Sixteenth Edition. By His Honour the late A. F. Topham, K.C., LL.M., Bencher of Lincoln's Inn, and R. Buchanan-Dunlop, B.A., of the Middle Temple, Barrister-at-Law. Part 3, Debentures. 1952. London: Stevens & Sons, Ltd. Price £6 6s. net.

The Companies Act, 1948, made only minor changes in the Law of the Debenture. This edition, therefore, apart from the introduction of the current references to statutes and bringing the Table of Cases up to date, has not required to be almost rewritten as was necessary in Parts 1 and 2 of the Precedents. If one may venture to point to an omission, it is a pity that some space has not been applied to the subject of that method of raising loan capital, now much in vogue—Convertible Loan Stock.

Generally speaking the work is in two sections: (a) the Law of the Debenture, and (b) Forms relating to the application of that law.

The Law of the Debenture is adequately set forth in Chapters 1 to 23. The remaining chapters contain forms (605 in all) including forms for use in judicial proceedings. The whole presents a complete picture of all that is pertinent to the subject.

An English publication, the volume is naturally for use in England, but, apart from the forms of process which do not apply in Scotland, it is of equal interest to Scots lawyers, as an exposition of the Law of the Debenture in Great Britain.

Palmer's Precedents of this edition maintain the high standard which the previous editions attained and will, without doubt, enjoy their popularity among those engaged in the practice of company law.

A. C. Bennett.

Puffs, Balloons and Smokeballs. By A. Laurence Polak, B.A., Solicitor. Illustrated by Leslie Starke. 137 pages. 1952. Chichester: Justice of the Peace, Ltd. Price 12s. 6d. net.

Mr. Polak's entertaining trifles of wisdom and wit contained in this small book have already appeared as individual contributions to the "Justice of the Peace and Local Government Review." The title is taken from the first article of the series which, as lawyers will expect, deals with trends of modern advertising. It points a warning to the unwary advertiser of commodities that, given a litigant as bold as

Mrs. Carlill of the *Carbolic Smoke Ball Case*, the averments in an advertisement may be construed *pro veritate* against the party making them. When Mrs. Carlill, after diligently snuffing her carbolic ball, nevertheless contracted influenza, and claimed the advertised sum as compensation, the company contended inter alia that the advertisement was a mere puff, not to be taken seriously. The English Court of Appeal, however, refused to see the joke, and decreed payment of the advertised sum. Today, less forthright than in the 1890s, advertisements often take the form of pseudo-scientific strip cartoons, wherein the characters communicate (in conversation-balloons) the woes incident to night starvation, and receive glad tidings of the nostrum—the inexpensive and blessed beverage which solves all life's troubles, bringing happy endings with the certainty of a Christmas pantomime. Are these advertisements mere puff? If not, some enterprising consumer of bed-time tonics who is nevertheless jilted, sacked, or otherwise falls upon the thorns of life, may yet gain *solatium* by suing on the offer contained in the advertisement. The floodgates of litigation will then be open, and a glorious era dawn for those seeking a livelihood in the temples of justice.

Women are among Mr. Polak's favourite targets, whether it be the American harpy claiming alimony, the Married Women's Association (which the author seems to accuse of claiming the best of both worlds), or the lady who, by resort to cosmetics and other contrivances, misrepresents her age, complexion, shape, and so forth, whereby she lures some man into marriage. On the precedent of a Private Member's Bill of 1770 (which never proceeded further than its first reading) the learned author argues that marriages induced by " colourable transactions " should be declared void. Mr. Polak also has an entertaining tilt at the Customs officials (p. 93) who in 1951 caused one, Mr. Roger Shaw, to be prosecuted for rescuing two pounds of steak which, on his arrival from Brussels by air, had been impounded as within the mischief struck at by legislation.

On the whole, the reviewer found Mr. Polak's form in the present series, though amusing, not quite so sparkling as in some of his earlier work. Moreover, the articles being short, it was not possible for the author to pursue legal hares with the persistence of, say, Sir Alan Herbert's "Misleading Cases." This is sometimes disappointing. A few of the articles depend on specialties of English law, which the Scottish lawyer would not readily grasp, and the reviewer must really express surprise that the learned author should refer at this date to *McAlister* v. *Stevenson*—even after Lord Macmillan's careful explanation in the L.Q.R. to the English law-report reading public as to how Scottish cases should be cited when a married woman is pursuer. The Lord Lyon defends the right of a Scotswoman after marriage to use her maiden surname—but this defence is not open to an author who uses an A.C. reference rather than S.C.(H.L.).

One may regret that the *Chocopuff Case* recently before Lord Birnam was not reported in time for Mr. Polak to deliver an appropriate broadside against bureaucracy. It would have fitted in well with the title of his entertaining series—which would be an agreeable companion on a train journey.

T. B. SMITH.

The Young Delinquent in his Social Setting. By Thomas Ferguson, Professor of Public Health and Social Medicine, University of Glasgow. 1952. London: Published for the Nuffield Foundation by Geoffrey Cumberlege, Oxford University Press. Price 10s. 6d. net.

In the middle of the twentieth century juvenile delinquency continues to be a perplexing problem. In order to comprehend it fully many factors, historical, social and psychological, require consideration. On the historical plane it can scarcely be doubted that the impact of two world wars and an internal social revolution have produced an unsettlement which is reflected in criminal statistics. Psychologically too much investigation is required. The seeds of delinquency are sown in the cradle and even earlier because pre-natal factors all contribute to the child's make-up. Apart, however, from those causes which are deep seated in history and psychology, there are various circumstances of a social character which are found habitually to accompany juvenile crime. These are such well-known factors as bad housing, unemployment of parents, lack of other interests and the like. These are factors which admit of being collated and an assessment made of their bearing on the criminal problem. That is the task which the writer of this book, Professor Thomas Ferguson, has set himself.

Professor Ferguson's task has been to make an elaborate survey of the effect of a number of social conditions on juvenile delinquency. He himself is Professor of Public Health and Social Medicine in the University of Glasgow. In this work he has made a close study of all boys in Glasgow leaving school at the earliest permissible date in January, 1947. No selection of type was made as all were included in the survey. These boys have been grouped into three classes, *viz.*: " ordinary " boys, physically handicapped boys, and mentally handicapped boys. All court convictions incurred by the members of these groups have been meticulously examined and collated in relation to the various factors likely to affect delinquency. The boys studied form a sufficiently large group to be treated as representative of a modern industrial community and the conclusions reached would probably be valid generally for any society of this kind. The study is a most valuable one and well justifies careful attention.

It is, of course, quite true that many of Professor Ferguson's conclusions are what one would expect. The mentally handicapped youth shows up far more unfavourably than the normal youth. The product of an overcrowded house is far more likely to take to crime than his more fortunately situated counterpart. Delinquency increases as the type of district deteriorates. It increases, too, with the size of the family. It is relatively infrequent among the children of skilled workers. It is more frequent among the children of the unskilled and it is most frequent when there is a long record of parental unemployment. Delinquency is found to increase as scholastic ability deteriorates and when there is irregularity in school attendance. The incidence of crime is appreciably less among members of organised social groups like boys' brigades and boy scouts and among church attenders. These are the kind of conclusions which one would expect and which are fully vouched here. What is less commonly appreciated is the relative importance of the kind of factors mentioned. Of factors personal to the boy himself much the most serious is low scholastic ability. Professor Ferguson ranks this as the greatest single factor associated with a high incidence of delinquency. Of lesser importance is poor physique, not that this should be minimised. Boys who are undersized and under weight are more likely to take to crime than normal boys. Of environmental circumstances the most important are the character of the house and the degree of overcrowding. The character of the house has greater importance than the " broken home " aspect. Indeed, a home broken by the absence of one of the parents is preferable to a discordant home. Again, the fact that the mother is working is considerably less important than is the general character of the house. This is the factor of transcendent importance. It is from slums that the highest proportion of juvenile delinquents come, and it is interesting to observe that even rehoused slum dwellers do not immediately respond to better environmental conditions. Another factor of almost equal importance is the family criminal record. The chance of a boy becoming a delinquent is very much enhanced by the presence of a convicted father or older brother.

Wherein then lies hope for the future? Broadly, no doubt it lies in improved social conditions, greater recreational facilities, and, one may venture to suggest, in a more Christian atmosphere. Such remedies cannot, however, be achieved overnight, and meanwhile the question remains of the proper treatment of the youth who actually appears in the dock. Here one can approach the problem either idealistically or realistically. Idealistically, why not plant colonies of these boys in remote regions in which they would engage for the most part in healthy out-of-door activities? Machinery would require to be devised for their being gradually replanted in the community in the most appropriate surroundings when they became fit for such replanting. This would seem to be a better solution in many ways than the approved school—not that one should decry the value of such institutions—provided that the " Botany Bay " suggestion could be eliminated. Meanwhile, however, judges in juvenile courts have to use such machinery as is available. Professor Ferguson's conclusions on the methods now in vogue are interesting. They are these:

1. Judged by their measure of success in preventing subsequent convictions, the lines of treatment adopted have failed to yield satisfactory results.
2. Handicapped children have proved less responsive to almost all types of treatment than " ordinary " young people.
3. Probation has produced better results than mere admonition.
4. Neither detention in a remand home nor whipping (when this was competent) has acted as any real deterrent.
5. The best results have been obtained in those cases in which parents were fined or bound to find caution for their boy's good behaviour.

The natural inferences to be drawn are that the probationary system has worked relatively well and that greater use might well be made of the system whereby parents have a pecuniary interest in the good behaviour of their children. In all this is a stimulating study and all interested in these problems are under a debt of gratitude to Professor Ferguson.

J. L. Duncan.

The Changing Law. By the Right Hon. Sir Alfred Denning, one of the Lords Justices of Her Majesty's Court of Appeal in England. 1953. London: Stevens & Sons, Ltd. Price 10s. net.

Since Mr. A. T. Denning ascended the Bench in 1944 he has become widely known as a judge of independent and progressive mind whom the fetters of precedent and tradition do not bind too rigidly, and both in the then King's Bench Division and as a Lord Justice in the Court of Appeal he has delivered judgments which struck resounding blows for the liberal and reasonable interpretation of rules of law, adapting them to modern conditions. Witness his onslaught on consideration in *Central London Property Trust* v. *High Trees House* [1947] K.B. 130, and his trenchant dissent in *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164.

The brief volume now published can be read in an evening but deserves, and requires, more prolonged reflection. It consists of five addresses delivered at various British Universities on different occasions, but having as their common theme that process of gradual change which is constantly taking place in the law, and not least slowly at the present time. The first address, on the Spirit of the British Constitution, underlines how, despite the social revolution of our time, the Constitution continues to be an effective framework protecting individual rights. In the last the learned author considers the influence of religion and outlines how Christian principles underlie such concepts as good faith, guilt, and responsibility, and he adds a strong plea for the growth of public opinion condemning divorce and infidelity.

The most interesting and illuminating are, however, the intervening three lectures, which deal respectively with the Rule of Law in the Welfare State, the Changing Civil Law, and the Rights of Women. In the first of these the writer shows convincingly, by reference to cases of the last few years, how well the courts in England have met some of the fresh problems presented by the Welfare State by the application of old remedies such as certiorari, and how, too, they have modified old rules so as to take account of the changed conditions since 1945, as in the case of the National Health Service: *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343. It is yet to be seen whether the Scottish courts will show the same combination of bold judicial development with respect for existing principles. Incidentally, his lordship is in error in writing (p. 29), *à propos* of *Cassidy's Case*, that the matter of liability came to a head "after the hospitals had been taken over by the State." *Cassidy* was a pre-Health Act case, but the Act supervened on the litigation so that the Ministry of Health was cited as defendant. But the liability surely fell to be determined as at the date of the negligence, which was April, 1948: see p. 344 of the report. But this does not detract from the merits of the discussion. His lordship also adverts to the dangers inherent in allowing government departments the wide privilege they enjoy of confidentiality for documents. These criticisms have subsequently been reinforced by a Court of Appeal of which Denning L.J. was not a member: see *Ellis* v. *Home Office* [1953] 2 Q.B. 135.

The lecture on the changes in the civil law stresses particularly the changed conceptions of consideration and mistake which have been accepted in recent years and the sudden recognition in England of the legal category of Restitution or Unjust Enrichment, but it is equally enlightening on vicarious liability and tort, while it is gratifying to find that the learned Lord Justice, like many lesser men, is somewhat baffled by *Horton* v. *London Graving Dock* [1951] A.C. 737.

The Rights of Women is a concise and penetrating account of how the " weaker " sex have attained equality at least with men and their position is so guaranteed and protected now that they may indeed be the " spoilt darlings " of the law.

These points are not all the good things in this too-short book. The five addresses were well worth reprinting and they deserve a wider public, not least because they are pleasant reading; not burdened with technicalities, they provide the soundest answer to those who would petrify the common law in a code. It can and does develop and take account of changed conditions and new developments without waiting for legislation: it is because it is so alive that it is the changing law.

D. M. WALKER.

OTHER PUBLICATIONS RECEIVED

(*A later review is not precluded, especially where books are received shortly before going to press.*)

A First Book of English Law. By O. Hood Phillips, M.A., B.C.L. (Oxon.), Barrister-at-Law. Second Edition. 1953. London: Sweet & Maxwell, Ltd. Price 17s. 6d. net.

The Honourable Society of Osgoode Hall. By C. H. A. Armstrong, Q.C. 1952. Toronto: Clarke, Irwin & Co., Ltd. Price $3.00.

Stroud's Judicial Dictionary of Words and Phrases. Third Edition. Edited by John Burke, Barrister-at-Law, and Peter Allsop, M.A., Barrister-at-Law. Vol. 3, M–R. 1953. London: Sweet & Maxwell, Ltd. Price £3 15s. net.

Family Law. By Jack Hamawi, M.A., LL.B. (Cantab.). Consulting Editor, W. A. Fearnley-Whittingstall, Q.C. With a Foreword by The Rt. Hon. Sir F. L. C. Hodson. 1953. London: Stevens & Sons, Ltd. Price £2 10s. net.

The Year Book of World Affairs 1953. Published under the auspices of The London Institute of World Affairs. Editors: George W. Keeton and Georg Schwarzenberger. Assistant Editor, L. C. Green. 1953. London: Stevens & Sons, Ltd. Price £2 2s. net.

Lectures on Taxation of Business Enterprize. Delivered at The Summer Institute of International & Comparative Law, University of Michigan Law School. 1952. Michigan University Press; London: Geoffrey Cumberlege. Price 48s. net.

The Elements of Income Tax Law. Second Edition. By C. N. Beattie, LL.B. 1953. London: Stevens & Sons, Ltd. Price 25s. net.

Current Trends in State Legislation 1952. Foreword by Dean E. Blythe Stason, University of Michigan Law School. 1952. Ann Arbor: University of Michigan Law School. Price 60s. net.

Governmental Liability. By H. Street, LL.M., PH.D. 1953. Cambridge: The University Press. Price 25s. net.

Annual Survey of South African Law 1952. Published for The Faculty of Law of the University of The Witwatersrand by Juta & Co., Ltd., Cape Town and Johannesburg. 1953.

English Courts of Law. By H. G. Hanbury, D.C.L. Second Edition. 1953. Oxford University Press. London: Geoffrey Cumberlege. Price 6s. net.

Royal Commission on Marriage and Divorce: Minutes of Evidence of the Marriage Law Reform Society taken on June 10, 1952. 1953. London: H.M.S.O. Price 6s. net.

Maxwell on the Interpretation of Statutes. Tenth Edition. By G. Granville Sharp, Q.C., B.A., LL.B. (Cantab.) and Brian Galpin, M.A. (Oxon.). With a Foreword by The Hon. Sir Henry Wynn-Parry. 1953. London: Sweet & Maxwell, Ltd. Price £2 5s. net.

The Rent Acts. Seventh Edition. By R. E. Megarry, M.A., LL.B. 1953. London: Stevens & Sons, Ltd. Price £2 10s. net.

Frederick William Maitland 1850–1906. A Memorial Address by Henry Arthur Hollond, Vice-Master of Trinity College, Cambridge. Selden Society Annual Lecture March 18, 1953. 1953. London: Bernard Quaritch. Price 4s. net to non-members.

The Word "Person." By H. C. Dowdall. Special Article in The Times Literary Supplement, May 8, 1948. 1953. London: The Shenval Press. Price 1s. 3d. net.

The United Nations and the Egyptian Blockade of the Suez Canal. A Study Sponsored by the Lawyers' Committee on Blockades. 1953. New York: Lawyers' Committee on Blockades.

Marsden on the Law of Collisions at Sea. Tenth Edition. By Kenneth C. McGuffie, B.L. 1953. London: Stevens & Sons, Ltd. Price £5 10s. net.

Current Legal Problems 1953. Edited by George W. Keeton and Georg Schwarzenberger. Volume 6. On behalf of The Faculty of Laws, University College, London. 1953. London: Stevens & Sons, Ltd. Price 37s. 6d. net.

Federal Examiners and the Conflict of Law and Administration. By Lloyd D. Musolf. 1953. Baltimore: The Johns Hopkins Press.

Legal Essays in Honour of Arthur Moxon. Edited by J. A. Corry, F. C. Cronkite and E. F. Whitmore. 1953. Toronto: University Press (London: Geoffrey Cumberlege). Price 80s. net.

Gatley on Libel and Slander. Fourth Edition. By Richard O'Sullivan, Q.C., assisted by Roland G. Brown. With a Foreword by The Rt. Hon. Sir Norman Birkett. 1953. London: Sweet & Maxwell, Ltd. Price £6 6s. net.

The Scottish Law List and Legal Directory for 1953. Edinburgh: The Scottish Law List, Ltd. London: Stevens & Sons, Ltd. Price 17s. 6d. net.

Jurisprudence : Men and Ideas of the Law. By Professor Edwin W. Patterson. 1953. Brooklyn: The Foundation Press, Inc. Price $7.50 net.

Law and Social Change in the U.S.S.R. By Professor John N. Hazard. Published under the auspices of The London Institute of World Affairs. 1953. London: Stevens & Sons, Ltd. Price 25s. net.

JURIDICAL REVIEW

SOME OBSERVATIONS ON ERROR

THE recent publication in England of the seventh edition of *Kerr on Fraud and Mistake*[1] raises the question whether there is not some danger in an uncritical acceptance in Scotland of English decisions and English expositions on mistake: more particularly, are the principles of English mistake and Scots error identical? The writer considers that the answer is in the negative, and in this article proposes, first of all, to discuss mistake and thereafter error.

I. MISTAKE

" Mistake has been said to be some unintentional act, omission, or error arising from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. The definition, however, obviously fails clearly to make the distinction between mistake and misrepresentation. The distinction is, however, of importance, for although a misrepresentation which gives rise to some legal effect usually involves a mistake on the part of the person to whom it is made, the term ' mistake ' in law means some misapprehension or misconception which has not been induced by a misrepresentation. Speaking generally in relation to contract, mistake renders it void in the sense that it prevents it coming into being owing to the absence of consent by one or both parties, whereas misrepresentation . . . merely renders it voidable, at the suit of the injured party if he elects to take the necessary steps " (p. 133).[2] In these days when borrowing from English law is an ever-developing tendency the distinction above referred to is of vital importance, and should not be lost sight of by any Scots lawyer who seeks to rely on English decisions. The reason for the distinction is a familiar one, *viz.*, the former division of the English courts into courts of common law and courts of equity. " It is necessary to remember that mistake is of two kinds : first, mistake which renders the contract void, that is, a nullity from the beginning, which is the kind of mistake which was dealt with by the courts of common law ; and, secondly, mistake which renders the contract not void, but voidable, that is, liable to be set aside on such terms as the court thinks fit, which is the kind of mistake which was dealt with by courts of equity. Much of the difficulty which has attended this subject has arisen because, before the fusion of law and equity, the courts of common law in order to do justice in the case in hand, extended the doctrine of mistake beyond its proper limits and held contracts to be void which were really only voidable, a process which was capable of being attended with much injustice to third persons who had bought goods or otherwise committed themselves on the faith that there was a contract. In the well-known case of *Cundy* v. *Lindsay*,[3] Cundy suffered such an injustice. He bought the handkerchiefs from the rogue, Blenkarn, before the Judicature Acts came into operation. Since the fusion of law and equity, there is no reason to continue this process, and it will be found that only those contracts are now held void in which mistake was such as to prevent the formation of any contract at all." [4]

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[1] *Kerr on the Law of Fraud and Mistake.* Seventh edition. By Denis Lane M'Donnell, O.B.E., M.A., of the Middle Temple, Barrister-at-law, and John George Monroe, B.A., of the Middle Temple and Lincoln's Inn, Barrister-at-law. 1952. London: Sweet & Maxwell, Ltd. Price £6 6s. net.

[2] The page references in brackets are to Kerr.

What then are the limits within which English mistake (as distinct from misrepresentation) operates? [5] The *species facti* seems to be as follows—there is an agreement between two or more parties which ostensibly has all the appearances of a valid and enforceable contract, and yet it is alleged that in reality there is no contract at all, that appearances are deceptive. The ground of the allegation is that mistake has prevented contract; but how? In contract the link which binds the parties to each other is succinctly expressed in the Latin tag *consensus in idem placitum*; when it is said that mistake has prevented a contract coming into being, what is meant is that mistake has affected this *consensus* in such a way that either there is *consensus* empty of substance or that there never was *consensus*.

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[3] (1876) 1 Q.B.D. 348; (1878) 3 App.Cas. 459.

[4] *Per* Denning L.J. in *Solle* v. *Butcher* [1950] 1 K.B. 671, at 690: Kerr, p. 130.

[5] Mistake in law is not considered.

The former is described in Kerr (p. 164) as " Failure of consideration." " If parties enter into an agreement with reference to a supposed state of things, and it turn out that, by the mutual mistake of the parties, the supposed actual state of things does not in fact subsist, then the consideration for the agreement fails, and the agreement is consequently void if and only if the supposed state of affairs was an ' underlying assumption of the parties ' in the sense that it was something which ' both must necessarily have accepted in their minds as an essential and integral element of the subject-matter.' " The important thing to note is that the consent of each party is genuinely given, that there is a real *consensus* if considered in the abstract and without reference to the consenters. A more thoroughgoing analysis serves to demonstrate that this reality of consent is an illusion, for the belief, common to the parties, and out of which common belief their respective consents emerged and met so as apparently to make a contract, was a false belief. This defect in the common belief taints the consents, and so prevents the coming into being of the contract.

The difficulty is, of course, to specify with tolerable accuracy what sort of belief there must be, and it is a thousand pities that the editors did not see their way to discuss under this heading the highly controversial decision of *Bell* v. *Lever Bros. Ltd.*,[6] instead of discussing that decision under the head of materiality, where they say (p. 150) " Mistake, to be a ground for relief, must be of a material nature, and must be the determining ground of the transaction. Mistake in matters which are only incidental to and are not of the essence of a transaction, and in the absence of which it is reasonable to infer that the transaction would nevertheless have taken place, goes for nothing,'' and preface the discussion to *Bell* v. *Lever* by remarking, " What must be established before a contract can be set aside on the grounds of mistake has been settled by the House of Lords in *Bell* v. *Lever Bros. Ltd.*'' This optimistic utterance should be compared with the sceptical comment by the learned editor of the latest edition of *Anson on Contract*: " The case is, of course, a final and binding authority for whatever it decides, but there has been some discussion as to what that is.''[7] " In this case, the plaintiffs, who had a controlling interest in the N. Co., entered into service agreements with the defendants under which they were to serve at substantial salaries as chairman and vice-chairman respectively of the N. Co. and devote their time and attention to the business. Whilst these agreements (as subsequently extended) had some time to run, the N. Co. was amalgamated with another company, and the further employment of the defendants became unnecessary. The plaintiffs thereupon entered into cancellation agreements with the defendants whereby they undertook to pay them £30,000 and £20,000 respectively by way of compensation for terminating their employment and of appreciation for their past services which had resulted in the amalgamation on terms favourable to the plaintiffs. After payment of these sums the plaintiffs became aware that during their service the defendants had engaged in certain transactions which would have entitled the plaintiffs to dismiss them summarily had they known of them. The plaintiffs brought an action to recover the compensation moneys on the ground *inter alia* that they had been paid under a mistake of fact '' (pp. 150–151).

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[6] [1932] A.C. 161.

The report does not disclose how the plaintiffs laid their case, and what arguments were advanced before the trial judge, Wright J., but it does disclose the following crucial findings in fact by the jury :

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[7] 20th ed., p. 149.

" (Q.) When Lever Brothers entered into the agreement of March 19, 1929, did they know of the actings of either of the defendants with regard to the above dealings . . . ?

(A.) No.

(Q.) If Lever Brothers had so known, would they have made these agreements or either of them?

(A.) No.

(Q.) At the date of the respective interviews before those agreements, had the defendant Bell, or the defendant Snelling, in mind their actings of these transactions?

(A.) No."[8]

These findings were the basis for the proposition that, at the time the cancelling agreements were entered into, both parties acted under the belief that the agreements to be cancelled were indefeasible by the plaintiffs alone. The vital questions were (a) was that belief with reference to some thing so material, that if erroneous there was operative mistake? (b) if "yes," what was the effect of that mistake?

Wright J. had no doubt about the answer to the first question : " In my judgment, on the true facts of the case, there was a total failure of consideration such as to vitiate the bargain, because in the words of Lord Westbury in *Cooper* v. *Phibbs*[9] the parties dealt with one another under a mutual mistake as to their respective rights. Both Lever Brothers and Mr. Bell in my opinion, at the time of the cancellation agreement, believed they were dealing with an obligation indefeasible save by the consent of Mr. Bell."[10] Despite the misleading nature of the reference to the parties' " respective rights," the interpretation of this passage seems beyond doubt, *viz.*, that there was a belief common to the parties, erroneous as to a matter of fact of so fundamental a character as to vitiate the contract.

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[8] *Loc. cit.*, pp. 204–5.

[9] L.R. 2 H.L. 149, 170.

[10] [1931] 1 K.B. 557, 569.

About the answer to the second question, the learned judge was not so certain. Counsel for the defendants had argued that rescission could not be decreed because *restitutio in integrum* was impossible.[11] To this Wright J. replied, " I am not clear that in such a case as the present, if I am right in my judgment as to there being such a common mistake as I have found, the agreement is not void . . . "[12] but, in any event, he held that the court could order rescission of the contracts and repayment of the moneys.

The defendants appealed and, before the Court of Appeal, the plaintiffs' argument was quite categorical: " . . . the mistake was mutual. Each party believed that the contracts of service, which were being cancelled on terms, were valid contracts. In fact they were invalid. ' If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake ' : *Cooper* v. *Phibbs per* Lord Westbury. The contract is not merely liable to be set aside. It is actually void."[13] The appeal was refused and all three judges of the Court of Appeal approved of the conclusion to which Wright J. had come with respect to " mutual mistake." They also held that the effect of such mistake was to make the agreement void.[14] The defendants appealed to the House of Lords and succeeded.

The rubric of the report reads : " Held . . . as to mutual mistake, on the ground that the mutual mistake related not to the subject-matter, but to the quality of the service contracts." Lord Blanesburgh, who was prepared to sustain the appeal on the ground that for technical reasons it was not open to the plaintiffs to plead " mutual mistake," nevertheless concurred with the judgments of Lord Atkin and

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[11] *Loc. cit.* at p. 571.

[12] *Loc. cit.* at p. 571.

[13] *Loc. cit.*, 577.

[14] *Vide* remarks of Scrutton L.J. at p. 585 on the dictum of Lord Westbury in *Cooper* v. *Phibbs*.

Lord Thankerton on this point.[15] Lord Atkin expressly approved of a proposition formulated by Sir John Simon (counsel for the plaintiffs): "Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the *consensus* has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided; *i.e.*, it is void *ab initio* if the assumption is of present fact, and it ceases to bind if the assumption is of future fact"[16] but pointed out that the efficacy of this proposition turns upon the meaning to be given to the phrases "a contractual assumption" and "basis." Then, after analysis of formulae used in previous cases, he decided that the true view was whether the difference between the subject-matter of the contract as in fact it was and as it would have been had the assumption common to the parties been true, was such a difference as to amount to a change in identity. "We therefore get a common standard for mutual mistake, and implied conditions whether as to existing or as to future facts. Does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts?"[17]

Lord Thankerton's reasoning is not quite so intelligible. "The phrase 'underlying assumption of the parties' as applied to the subject-matter of a contract may be too widely interpreted so as to include something which one of the parties had not necessarily in his mind at the time of the contract; in my opinion it can only properly relate to something which both must necessarily have accepted in their minds as an essential and integral element of the subject-matter. In the present case, however probable it may be, we are not necessarily forced to that assumption . . . In the present case the terms of the contract throw no light on the question, and, as already indicated, I do not find sufficient material to compel the inference that the appellants, at the time of the contract, regarded the indefeasibility of the service agreements as an essential and integral element in the subject-matter of the bargain." [18]

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[15] [1932] A.C. 161, 199.
[16] *Ibid.*, p. 225.
[17] *Ibid.*, p. 227.

One inference from this seems to be that had Lord Thankerton been able to hold as a matter of fact that both parties contracted on the assumption that the service contracts were indefeasible, then he would have disallowed the appeal. But even that conclusion, if right, does not materially help to an elucidation of his thought on the vexed question, What is the criterion of something as an essential and integral element of the subject-matter? Three interpretations at least are possible: (1) The subjective test—which refers to the intention of the parties and is content to decide the problem by asking the question whether the "something" which the parties believed to be true was considered by them to be vital to the existence of the contract. This, of course, has the defect of all criteria which depend upon the intention of the parties, and which usually resolve into the formulation of canons of construction: (2) a combination of subjective and objective criteria, *viz.*, not only must the parties consider it vital, but also the difference between the believed fact and the true fact is such as amounts to a difference in substance but falls short of a difference in identity.

The objections to this interpretation are many. What is meant by substance? If substance is less than identity, then it seems to be indistinguishable from quality, and yet the passages quoted by Lord Thankerton from the judgment of Blackburn J. in *Kennedy* v. *Panama Royal Mail Co.*[19] and approved by him reject such a conclusion. The only possible solution would be if substance is to be interpreted as something greater than quality but less than identity.

(3) As in (2), but the something, in the words of Lord Atkin, must "destroy the identity of the subject-matter as it was in the original state of facts." Probably, this is what Lord Thankerton had in mind, and, if so, his judgment

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[18] *Ibid.*, pp. 235, 236.

[19] L.R. 2 Q.B. 580.

is understandable on the hypothesis that he was in agreement with Lord Atkin as to " identity," but it was not necessary to decide the point because the belief was not common to the parties to this extent at least that one side did not regard " the indefeasibility of the service agreements as an essential and integral element in the subject-matter of the bargain."

Lord Warrington of Clyffe, the only member of the minority to deliver a judgment, was not more helpful :

" The real question, therefore, is whether the erroneous assumption on the part of both parties to the agreements that the service contracts were undeterminable except by agreement was of such a fundamental character as to constitute an underlying assumption without which the parties would not have made the contract they in fact made, or whether it was only a common error as to a material element but one not going to the root of the matter and not affecting the substance of the consideration.

" With the knowledge that I am differing from the majority of your Lordships, I am unable to arrive at any conclusion except that in this case the erroneous assumption was essential to the contract without which it would not have been made." [20]

Presumably by " consideration " is meant what the plaintiffs were to get, *viz.*, the service agreements, but the language of the noble lord does not enable any accurate meaning to be given to the word " substance."

Certain things are clear. There must be a common belief with regard to something which is essential. The problem is how essential? To that problem *Bell* v. *Lever Bros.* seems to have given no clear and unequivocal answer. It is to be regretted, therefore, that Kerr contains such an oracular and misleading statement as this : " The correct interpretation of that case is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends . . . " (p. 153). Perhaps the present position in English law may be stated as follows : A contract is void on the ground of mutual mistake if the parties have acted upon a common assumption as to the nature of the subject-matter of the contract, provided the assumption is as to something which is fundamental. That something will be fundamental if the difference between the subject-matter as it in fact is and as it would have been had the assumption been true, amounts to a difference in identity or kind.[20a] What is not clear is whether something less than a difference in identity will be regarded as fundamental. English law accepts a doctrine of *error in corpore* ; whether it also accepts a doctrine of *error in substantia* is a question to which only the House of Lords can give a satisfactory answer.

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[20] [1932] A.C. 161, 208.

The second aspect of mutual mistake differs from that just discussed in this, that instead of there being an erroneous assumption common to both on which the parties have proceeded to exchange genuine consents, there is no *consensus in idem*. This is true " mutual " mistake, where each party is mistaken as to the other's intention, though neither realises that his promise has been misunderstood by the other.[21] It is, of course, subject to the well-known qualification that intentions and, therefore, *consensus* are to be judged objectively. The leading case in this field is *Raffles* v. *Wichelhaus*, [22] " where A and B contracted for the sale of the cargo to arrive ' per ship *Peerless* from Bombay,' and it appeared that there were two ships of that name then arriving from Bombay, and that A meant one ship and B the other. It was held that there was no contract " (p. 171).

The difficulties which arise in both categories of mistake are the product of two closely related rules, *viz.*, of personal bar, and of innocent misrepresentation. An illustration will explain. " A makes an offer to B, believing him to be C, and C accepts believing the offer to be meant for him." This is a case of genuine mutual mistake, and, it has been said, " the reports do not furnish us with any such case." [23] Two views are possible, first, that such mistake is operative, but A is barred from founding on it because, there being no latent ambiguity as in *Raffles* v. *Wichelhaus*, " commercial contracts are arranged according to what people say." The other view is that A could only succeed if he could show that C knew, or ought to have known, that he, A, did not intend to contract with him, C. The difficulty which the first view raises is this, that if theoretically correct it means that English law recognises pure unilateral mistake. The mere fact that in practice the doctrine of personal bar denies a remedy does not affect the theory. The other view, which is only clearly stated by the learned authors of *Cheshire & Fifoot* [24] raises sharply the question: What is the difference between unilateral mistake meaning " one only of the parties to a contract is mistaken but that the other is aware or ought reasonably to have been aware of the mistake " [25] and misrepresentation, either innocent or fraudulent, affecting the intention of one of the parties and so the formation of the contract?

[20a] *Vide*, for example, the observations of Hallett J. in *Nicholson and Venn* v. *Smith Marriott* (1947) 177 L.T. 189.

[21] *Vide* Cheshire & Fifoot, *Law of Contract*, 2nd ed., p. 162.

[22] (1864) 2 H. & C. 906.

If it be assumed that in *Bell* v. *Lever Bros.* (a) the difference between a defeasible service contract and an indefeasible service contract was a difference in identity; and (b) that indefeasibility was regarded by the parties as an essential and integral element, then the possible variations are—the existence of this mutual mistake and (first) the complete innocence of the parties; (second) concealment on the part of Bell that the contracts were not indefeasible; (third) a representation on the part of Bell made with no intention to deceive that the service contract was indefeasible; (fourth) a representation on the part of Bell made with intention to deceive that the service contract was indefeasible. Do these variations produce different results? It is difficult to see why they should. If the result in the first case is no contract, then *a fortiori* the same result should follow in the second, third and fourth cases. The same reasoning seems to apply to the category of *Raffles* v. *Wichelhaus*. Yet one apparently major difficulty is that whereas mistake makes a contract void, it is generally proclaimed that misrepresentation, innocent or fraudulent, merely makes it voidable. The distinction between the last two is that fraud sounds in damages. Where third parties are involved it may be vital to succeed on mistake.

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[23] Anson, 20th ed., p. 159a.

[24] *Op. cit.*, p. 166.

[25] *Op. cit.*, p. 166.

What seems clear enough is that to say fraudulent misrepresentation only renders a contract voidable is only a half-truth. If the effect of the misrepresentation is such as to prevent the giving of any real consent by the party deceived, the contract is void not because of mutual mistake, but because of mistake fraudulently created.[26]

Misrepresentation in English law offers much more difficulty, partly because of its historical development. The learned editor of *Anson* (20th ed.) observes : " In dealing with misrepresentation as a circumstance invalidating a contract we must note . . . that a man may, during the preliminary bargaining, make statements of fact which are afterwards embodied in the contract itself, in the form of an undertaking or warranty that certain things are, just as he may promise that certain things shall be. In either case the undertaking or promise is a term of the contract. On the other hand, he may make during the preliminary bargaining statements of fact intended by neither party to be terms of the subsequent contract but which nevertheless may seriously affect the inclination of one party to enter into it.

" Representation, therefore, may introduce terms into a contract and affect performance ; or it may induce a contract and so affect the intention of one of the parties and the formation of the contract." [27] But the distinction is vital. Prior to the Judicature Act, 1873, the common law courts would only grant a remedy in respect of innocent misrepresentations which formed part of the contract, and even there a distinction was taken between a condition [28] and a warranty.[28] The former allowed an action of reduction, the latter only an action for damages. To fill in the gap Chancery eventually [29] allowed an action of reduction where it could be shown that the misrepresentation, though not forming part of the contract, had induced the contract. By the Judicature Act it was provided that equitable claims could be made in any court and that where the rules of common law and equity are at variance the latter will prevail. The consequence is that any misrepresentation which induces a contract will found an action of reduction, whether it forms part of the contract or not. The converse is not true, however, that all misrepresentations forming part of the contract found such an action, unless they also induce the contract.[30] There is no reason to believe, however, that the mere fact that the mistake is created by the innocent misrepresentation should limit the remedy. Confusion, if any, arises from the fact that "innocent misrepresentation" is an ambiguous term. It may mean both the manner in which the erroneous belief has arisen and the remedy therefor. This is orthodox innocent misrepresentation. Or it may mean only the manner in which the erroneous belief has arisen, but the remedy will be mistake, because, let it be assumed, there has been *error in corpore*.

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[26] Cheshire & Fifoot, *op. cit.*, at p. 178 and p. 206. Gloag & Henderson, 5th ed. at p. 75 does not make this so clear as might be desirable.

There remains for consideration the case where A is mistaken and B is aware of that mistake, or ought to be aware of it. For all practical purposes there is no difference between actual and constructive knowledge, and the distinction, if any, may be ignored. The difficulty here is that mere non-disclosure does not amount even to innocent misrepresentation. Thus in *Keates* v. *Lord Cadogan*,[31] where the defendant let to the plaintiff a house which he knew to be in a ruinous condition and which he knew the plaintiff required for immediate occupation, it was held that no action lay. The action was laid on fraud, but, even under the modern law the plaintiff would have no right to avoid the contract simply because there was no misrepresentation. If in such circumstances there is not even the taint of voidability, how could it even be argued that a contract is void? The answer seems to be that the greater may not always include the less. In *Keates* the plaintiff would probably still fail even if he were to plead mistake, because there is no difference in identity between number 10 Downing Street in habitable condition and number 10 Downing Street in ruinous condition; but given *error in corpore* there is no reason to deny a remedy on the ground of mistake simply because the lesser remedy of innocent misrepresentation might not be available.

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[27] *Op. cit.*, p. 169.

[28] These are used as English terms of art.

[29] *Cooper* v. *Joel* (1859) 1 De G.F. & J. 240.

[30] *Cf.* Cheshire & Fifoot, *op. cit.*, p. 200; Anson, *op. cit.*, pp. 175, 176.

Thus, the generalisation may be made that in the English law of mistake, with the exception of pure mutual mistake, everything turns upon the nature of the mistake, and the fact that what is mistaken is accepted by the parties as an essential and integral element of the contract, but this does not mean, however, that both parties need be mistaken. It is enough that they share the mistake in the sense that one is innocent of it and genuinely mistaken, and the other knows of it.

That this is so seems to be confirmed by the identity cases. Thus in *Gloag & Henderson* (5th ed., p. 75) the statement is made: " If a party believes that he was contracting with A, and in reality contracting with B, he has given no consent and incurred no obligation, provided that, in the circumstances, the identity of the other party was material." That may be good Scots law, but it does not seem to be sufficient for English law. That law requires two conditions to be satisfied, (1) that the mistake is fundamental; (2) that the thing mistaken is accepted by the parties as an essential and integral element. Given good faith on the part of A and B, condition number one seems satisfied. Is condition number two? It is not enough that the identity of B is material to A alone. It must be material to both, in the sense that each accepts the identity of B as an essential and integral element of the contract. Now, if B is unaware that A is mistaken, and genuinely believes that A is really contracting with him, B, there is no materiality. If B knows of A's belief, then by keeping silent he acquiesces in the fact that identity is an essential and integral element. There is the same acquiescence and acceptance if B misrepresents either innocently or fraudulently.

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[31] 10 C.B. 591.

At this stage perhaps a few comments may be made on the passage on "Error as to Identity" appearing in *Gloag & Henderson* (5th ed., p. 75). The sentence above quoted is followed by this reference to *Morrisson* v. *Robertson*[32]: "So where A, pretending to be the son and agent of a well-known farmer, induced a dealer to sell him on credit and deliver two cows, and at once resold them, it was held that the dealer might recover them from the purchaser. He had not merely been induced to sell by A's fraud (which would only have rendered the sale voidable in a question with A), he had never intended to contract with A at all. The sale was not merely voidable but void." It is submitted that this statement is not only self-contradictory but accurate neither in fact nor in law. The self-contradiction is patent. The inaccuracy in fact lies in the premise that the dealer sold to A. He never did. A took delivery not as buyer, but as agent for an alleged buyer. This is the point on which the whole case turns, *viz.*, as there never was a buyer there could be no contract of sale. Here is the inaccuracy in law (apart altogether from the statement in parenthesis which seems incredible), for the *species facti* of *Morrisson* v. *Robertson* does not fit into the category of mistake at all.

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[32] 1908 S.C. 332; 1908, 15 S.L.T. 697.

Cundy v. *Lindsay*,[33] which is cited in support, is entirely different. There A by representing himself to be B, induced C to contract with him: but A was a contracting party. *Said* v. *Butt*[34] is also distinguishable. There A, who knew that B would not contract with him, persuaded C to act as his agent and contract with B. When A emerged as the principal, B repudiated the contract. In *Morrisson* v. *Robertson* there never was a principal.

The same reasoning and criticism applies to note 75, which reads: "The decision of Horridge J. in *Phillips* v. *Brooks* [1919] 2 K.B. 243, is irreconcilable with *Morrisson* v. *Robertson*, and could not be followed in Scotland." It is submitted, with respect, that no question of reconciliation arises. The cases are in different categories. In any event the decision in *Phillips* v. *Brooks* turns on an inference from the facts, and not on any novel principle of law. The facts of that case were as follows: "A man called North entered the plaintiff's shop and selected pearls of the value of £2,550 and a ring worth £450. He then wrote out a cheque for £3,000 saying, as he did so, 'You see who I am, I am Sir George Bullough,' and he gave an address in St. James's Square. The plaintiff had heard of Sir George Bullough and upon consulting a directory he found that he lived at the address mentioned. He then said: 'Would you like to take the articles with you?'; whereupon North replied: 'You had better have the cheque cleared first, but I should like to take the ring, as it is my wife's birthday tomorrow.' The plaintiff let him take the ring. North pledged the ring for £350 to the defendant, who had no notice of the fraud."[35] It is clear, therefore, that to succeed the plaintiff had to establish mistake as to identity. A condition to be fulfilled was that he had entered into the contract on the footing that the identity of the buyer was an integral and essential element. The trial judge held on the evidence that the plaintiff had not contracted on that footing.

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[33] (1878) 3 App.Cas. 459.

[34] [1920] 3 K.B. 497.

[35] The facts are taken from Cheshire & Fifoot (2nd ed.), p. 175.

It is rather curious that the chapter in *Kerr on Mistake* should conclude with a paragraph headed " Principles on which Court interposes on the ground of mistake," and that the first sentence of this paragraph should read as follows : " Where there has been some common mistake as to some essential fact, forming an inducement to a contract, or the price, or the terms, that is, where the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the contract is voidable at the election of either of the parties " (p. 174). It seems impossible to understand what is meant by this passage. If it is intended to refer to mistake, then the contract is void not voidable. If it refers to misrepresentation, then it is trite law that only the party prejudiced by the misrepresentation can sue upon it. No help is forthcoming from the cases cited in the same paragraph. Thus *Freeman* v. *Jeffries*[36] is a case of quasi-contract in respect of money paid under mistake. *Clarke* v. *Dickenson*[37] is a case on fraud, and *Strickland* v. *Turner*[38] is a case on mistake. Nevertheless the paragraph serves as an occasion to point out the connection which exists in English law between mistake and misrepresentation. The following summary may demonstrate this :

(1) In all probability there is no pure unilateral mistake in English law. All species of mistake are " mutual " in one or other of the following senses :

(a) Mutual mistake properly so called, where the parties are mistaken as to each other's intention. It is true, as has been often remarked upon by textbook writers,[39] that this is not mistake at all but " mutual misunderstanding," but usage has sanctified the category. The test of intention is, of course, objective, but apart from this qualification there seems to be no other ; that is, in this category the conditions of (a) something fundamental and (b) accepted by the parties as an essential and integral element, do not apply.

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[36] (1869) L.R. 4 Ex. 189.
[37] (1858) E.B. & E. 148.
[38] (1852) 7 Ex. 208.
[39] *e.g.*, Cheshire & Fifoot, *op. cit.*, p. 158—the terminology is taken from this work.

(b) Mutual mistake improperly so called, which may be either

(i) common mistake where both parties are mistaken; or

(ii) impure unilateral mistake where one party only is mistaken, but the other is aware, or ought reasonably to be aware, of that mistake, or has caused the mistake by misrepresentation.

Here the conditions above referred to are of the essence, both must be fulfilled. It is undecided whether "fundamental" is restricted to *error in corpore* or extends to *error in substantia* or in quality. The probability is that it is restricted to the former. In the case of impure unilateral mistake, it is immaterial how the mistake has been brought about. It need not have been induced by the other party.

(2) On the other hand, where the erroneous belief falls short of the standard of something fundamental and relates only, for example, to motive, whilst it may be true to say that mistake affecting motive has no legal result, it is untrue to say that there never is a remedy where the erroneous belief is as to motive, for, if the plaintiff can show that he was induced to enter into the contract in consequence of a misrepresentation of the other, then the contract is voidable at his option under certain circumstances. In this way the category of misrepresentation which is distinct from mistake, supplements mistake and may give relief when the erroneous belief is as to motive and relates only to quality.

II. ERROR [40]

In his *Treatise on the Law of Sale*, Richard Brown remarked: "In Scotland misrepresentation and mistake are included in the phrase *error in essentialibus*." [41] There are several meanings which may be attributed to this statement of which two may be considered. One is that the difference between Scots law and English law is a mere matter of terminology, that error in Scots law may void a contract as mistake does in English law, or it may only render a contract voidable as does misrepresentation; the effect will depend upon the nature of the error. The second is that misrepresentation in the English sense forms no part of Scots law. If this be true, the consequences are either (a) if Scots error and English mistake are identical, then Scots error is much more restricted. It is not supplemented as English mistake is by misrepresentation: or (b) Scots error is wider in scope than English mistake and, therefore, does not require misrepresentation. The best approach seems to be by way of the question: Does Scots law in principle (that is, in so far as not affected by misunderstood English law) afford the remedy for misrepresentation?

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[40] There tends to be some confusion in the use of the various terms descriptive of error, *e.g.*, *error in essentialibus*, *error in substantialibus*, *error in corpore*,

Under the heading "Innocent Misrepresentation" the current edition of *Gloag & Henderson* contains these sentences: "A statement honestly believed may nevertheless, if untrue, mislead the party to whom it is made, and induce him to contract under essential error. This will render the contract voidable." [42] The authority cited is *Stewart* v. *Kennedy*.[43] This is followed by the well-known quotation from Lord Watson in *Menzies* v. *Menzies*.[44] "Error becomes essential wherever it is shown that but for it one

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error in substantia, etc. The first two terms should give no real difficulty. Any form of erroneous belief which amounts to error rendering an apparent contract void may be described as essential error, or error in substantials. An erroneous belief falling short of essential error or error in substantials is not legal or operative error. The second two terms offer more difficulty. Error *in substantia* may be used (as it is used in the exerpt with which this article concludes) to describe all error with reference to the subject-matter of the contract which is operative. So used it embraces both error *in corpore* and error as to quality: or it may be used as a category distinct from and falling short of error *in corpore*, but including error as to quality. For the purposes of this article error *in substantia* is used in this latter sense, subject to the exception noted above.

[41] 2nd ed., 1911, p. 412.

[42] At p. 69.

[43] (1890) 17 R.(H.L.) 25.

[44] (1893) 20 R.(H.L.) 108.

of the parties would have declined to contract." The facts in *Stewart* v. *Kennedy*, so far as relevant, seem to be these. The pursuer entered into an agreement with the defender to sell him an estate. There was no disagreement as to the parties, the subject-matter and the price. The ground of the pursuer's action was that his offer had been misunderstood, *viz.*, that he had not entered into an absolute and unqualified agreement to sell, but only into an agreement to sell provided the court, upon a consideration of all the circumstances, should come to the conclusion that the estate ought to be sold at that price. So understood the case was one of pure mutual error. The parties were at cross purposes as to what were their respective intentions. Applying the objective test the First Division came to the conclusion that the pursuer was bound, the agreement not yielding the construction placed upon it by the pursuer. Lord Shand dissented. He held that an inquiry should be allowed into the state of the pursuer's intentions at the time he entered into the contract, and if that inquiry proved that his averments were correct, then there could be no contract. The important features of Lord Shand's judgment are two. First, that pure unilateral error, if proved, was a good ground of reduction; secondly, that it was not a question of a voidable contract, but whether there had ever been a contract at all. In the House of Lords the question was whether the pursuer's case was helped by allegations that his belief as to the nature of the agreement into which he was entering was induced by the defender's misrepresentations. This took the case completely out of the category of pure mutual error and put it into the category of impure unilateral error. Thus what now became of importance was the question whether the erroneous belief of the pursuer was as to something fundamental. The Lord Chancellor (Herschell) was expressly of this opinion,[45] and Lord Watson seems to have been of the same opinion, for after referring to the definition of essential error given by Professor

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[45] p. 26.

Bell (*Principles*, section 11), he says, " I think it may be safely said that in the case of onerous contracts reduced to writing the erroneous belief of one of the contracting parties in regard to the nature of the obligations which he has undertaken will not be sufficient to give him the right, unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract."[46] " Nature " in this dictum can only have the meaning which it has in Bell's definition.

If this explanation of *Stewart* v. *Kennedy* be correct, then even according to English law it was not a question of misrepresentation, but of " mutual mistake," of which the particular species is impure unilateral mistake. It is difficult to see how the case can be considered as an authority on innocent misrepresentation.

In *Menzies* v. *Menzies* a son brought an action of reduction of an agreement entered into with his father for disentailment of estates of which the father was the heir in possession and the son the next heir. The occasion of the agreement had been the pursuer's financial difficulties. He alleged that he had only entered into the agreement to disentail in the erroneous belief induced by the representations of his father's agent that it would be almost impossible to raise money on his *spes successionis*. The effect of the agreement was to deprive him of his *spes successionis*. The House of Lords held that there had been essential error induced by the defendant's misrepresentations. Clearly, so far as English law goes, this was a case of innocent misrepresentation. There was a representation of fact, which the defender intended the pursuer should act upon, and it was acted upon by the pursuer : it induced him to enter into the contract. Moreover it was a misrepresentation, being false. It does not follow, however, that that alone was enough in Scots law. To succeed in Scots law the pursuer had to prove essential error, of which the categories according to Bell, and as approved of by Lord Watson in *Stewart* v. *Kennedy*, are person, price or consideration, quality, nature and subject-matter. That this is so is clear from the opinion of Lord Watson if quoted in full. The quotation in *Gloag & Henderson* is incomplete. Lord Watson said: "Error becomes essential whenever it is shown that but for it one of the parties would have declined to contract. He cannot rescind unless his error was induced by the representations of the other contracting party, or of his agent, made in the course of negotiation, and with reference to the subject-matter of the contract."[47] The operative phrase is "subject-matter of the contract." Again, we are into the category of impure unilateral mistake, *viz.*, an erroneous belief on the part of one party as to the substance[48] of the contract known[49] to the other party. On this view *Menzies* v. *Menzies* is also no authority for innocent misrepresentation.

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[46] p. 29.

The other Scottish authorities relied on in *Gloag & Henderson* are *Woods* v. *Tulloch* (1893) 20 R. 477; *Edgar* v. *Hector*, 1912 S.C. 348; 1912, 1 S.L.T. 93; *Ritchie* v. *Glass*, 1936 S.L.T. 591; *Mair* v. *Rio Grande Rubber Estates Ltd.*, 1913 S.C. (H.L.) 74; 1913, 2 S.L.T. 166; *Westville Shipping Co.* v. *Abram S.S. Co.*, 1922 S.C. 571; 1922 S.L.T., 452; 1923 S.C. (H.L.) 68; 1923 S.L.T. 613.

Woods v. *Tulloch* was an action brought by the purchaser of a mineral property against the seller for reduction of the sale on the ground that he had entered into it under essential error induced by the seller's misrepresentations as to the extent and rental of the subjects. He averred that the defender in negotiations for the sale represented the extent to be 132 acres and the rental £157, whereas in fact the extent was 125 acres and the rental £120 10s. There were no averments of fraud. The Lord Ordinary (Kyllachy) dismissed the action as irrelevant, saying, "I know no authority in the law of Scotland for the proposition that an innocent misrepresentation not warranted, and not inducing essential error, can invalidate a contract. Our rule, as I understand it, has always been that statements by a party made in negotiating a contract are, unless warranted, held to be merely statements of his knowledge and belief, and that if the other party means to rely on such statements, his business is to get them warranted, that is to say, to get them made parts of the contract. It is said that a different rule now prevails in England, and that any material misrepresentation is there sufficient to void a contract. I am not satisfied that that is so. There are certainly dicta, particularly of Chancery Judges, which may be so interpreted, but the judgment of Lord Blackburn in the case of *Kennedy* v. *Panama, etc., Mail Company*, L.R. 2 Q.B. 587, appears to state the law exactly as it would be stated in Scotland—the rule or principle being that an innocent misrepresentation, even although material, cannot form a ground of rescission unless (1) it is warranted, or (2) was the result of inducing what in the law of Scotland is known as essential error. In any case, I am satisfied that this is still the law of Scotland, and I think that the recent judgment of the House of Lords in the case of *Stewart* v. *Kennedy* may be fairly considered as at least an indirect authority to that effect.''[50]

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[47] p. 142.

[48] In Scots law this may have a wider meaning than in English law.

[49] In this case the erroneous belief of the pursuer was known to the defender's agent.

In so far as this decision is an authority, and the reasoning and judgment of the Lord Ordinary were expressly approved by the First Division, it is directly against the proposition on innocent misrepresentation contained in *Gloag & Henderson*. If the case of warranty be put aside, for then the category is not one of error but whether the seller has been able to perform what by the terms of the contract he has bound himself to perform, it demonstrates the gulf which exists between English misrepresentation and misrepresentation in so far as in Scots law it enables a pursuer to get into the category of essential error. In English law the rule is as stated in *Gloag & Henderson*, or, as argued before Lord Kyllachy, " that any material misrepresentation " renders a contract voidable. Lord Kyllachy's reference to *Kennedy* v. *Panama, etc., Mail Company* was meaningless if he meant to assert that the law there laid down on misrepresentation was the law of England in 1893. It was not. *Kennedy* was a common law case decided in 1867 before the passing of the Judicature Act. The decisions of *Lamare* v. *Dixon* (1873)[51] and *Redgrave* v. *Hurd* (1881),[52] especially the latter, are authorities for the rule that a misrepresentation of fact of one party, even though innocent, causing or inducing the other to enter into the contract renders the contract voidable at the other's instance.

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[50] At p. 479.

In the same category is the decision in *Edgar* v. *Hector.* There it was a case of a sale of chairs which the buyer averred the seller had represented to be genuine antiques. The decision turned on the question whether the difference between antique chairs and non-antique chairs was a difference in substance amounting to a difference in kind, or identity. In fact the same question was canvassed there as was canvassed in *Bell* v. *Lever.* What may be questionable in the case is the assumption in Lord President Dunedin's judgment that Scots error and English mistake are co-extensive, for example, that the former excludes *error in substantia* or as to quality.[53] What is unquestionable is that the misrepresentation there referred to has nothing to do with English misrepresentation.

Mair v. *Rio Grande Rubber Estates, Ltd.* was a case of fraud. The sole reference to innocent misrepresentation is an *obiter dictum* by Lord Shaw[54] to the effect that even had there been no fraud the pursuer would have been entitled to succeed. It was an action for reduction of a contract to take shares, based on misrepresentations (held to be fraudulent) contained in the prospectus. No question of essential error arose. The authorities relied upon by Lord Shaw were wholly English, and it is submitted that his obiter, in so far as it may be interpreted to the effect that English innocent misrepresentation is part of Scots law, is wholly without foundation and authority.

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[51] L.R. 6 H.L. 414.

[52] 20 Ch.D. 1.

[53] The Lord President seems to have assumed that English law was restricted to *error in corpore.* As has been shown above this may be still an open question.

[54] 1913 S.C.(H.L.) 74, at 82.

The first clear statement in favour of the rule contained in *Gloag & Henderson* is found in the opinion of Lord President Clyde in *Westville Shipping Co.*, where he said: "It is obvious that Lord Watson's description of the quality of essential error (for the purposes of a plea of essential error induced by innocent misrepresentation) covers any error material to the entering into the contract, and the consequent acceptance of its rights and obligations. It involves no closer relation with the essentials of the contract itself (as defined, for instance, in Bell's *Principles*, section 11), than is required in the case of fraudulent misrepresentation when pled as a ground for reducing a contract."[55] The Lord President also indicated that the effect of error so induced was to make the contract voidable.[56] In *Ritchie* v. *Glass* the Lord Ordinary (Carmont), without referring to *Westville*, came to a similar conclusion. The learned judge observed: "The law as to the cutting down of contracts where there has been misrepresentation seems to me to be in a state of confusion. Bell, in his *Principles* (section 11), sets out five categories of cases in which error is to be deemed in substantials of contracts, or in other words, cases in which there is essential error which has the result of invalidating consent. The fourth head of the five is, 'in relation to the quality (to which the editor has added "quantity or extent") of the thing engaged for, if expressly or tacitly essential to the bargain.' It is accordingly obvious that error as to the quality of the subject of a contract will not invalidate the contract unless quality is mentioned in the bargain, or unless it is plainly to be implied that the parties had it in contemplation. But it has to be kept in view that an error as to quality is in that section set out by Bell as something which may invalidate consent and make the contract, therefore, void. It is annulled on the ground of essential error—an error which falls into one of the five categories of the substantials of a contract. It has apparently been assumed by some that error, if induced by misrepresentation of the other party to the contract, must also be in regard to an essential—or in substantials—before the contract can be set aside. There seems to me to be no justification for that view in Bell. Indeed in the very section he says 'that obligations and contracts are annulled or dissolved on the ground either of essential error (section 11) or of error produced by misrepresentation or fraud (section 13 *seq.*)' it being notable that the error which is to be coupled with misrepresentation or fraud is not qualified by the adjective 'essential,' whereas error not so induced must be essential error in order that the contract should be dissolved. If this is the correct reading, then error in quality, quantity, or extent, if induced by misrepresentation of the other party, need not be an express term of the bargain or even one that by implication entered into the minds of both parties. I think that perhaps the way the matter is phrased by Lord Watson in *Menzies* v. *Menzies* ((1893) 20 R. (H.L.) 108, at p. 142) has led to some confusion. 'Error,' said his Lordship, 'becomes essential whenever it is shown that but for it one of the parties would have declined to contract.' Divorced from its context I think that this sentence is easily capable of misinterpretation. It cannot mean, I think, that apart from the test of what would move a reasonable man, any view founded on misrepresentation made by the opposite party in connection with a contract can be elevated into error sufficient to displace the bargain merely because a party has in fact acted on that view. And it is perhaps unfortunate that error even tested by what would move a reasonable man should be called essential, seeing that the usual use of the phrase 'essential error' is in connection with error in the substantials of a contract, as witness Bell in section 11. As I understand *Menzies's Case*, the House of Lords was treating the case as one of error connected with the nature of the contract entered into, but Sir Neil's error was not regarded as essential within the meaning of Bell's eleventh section, for pure error as to the nature of the contract falls under Bell's fifth head and *per se* would have been sufficient to set aside the bargain; and Lord Watson definitely said: 'He (*i.e.*, Sir Neil Menzies) cannot rescind unless his error was induced by the representations of the other contracting party or of his agent made in the course of negotiation, and with reference to the subject-matter of the contract.' What was there being considered was error existing to a material degree, or on a material but not necessarily essential point, and induced by the misrepresentations of the other party and so leading to a contract.

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[55] 1922 S.C. 571, at 579.

[56] At p. 580.

"It appears clear that Scots law recognises, as indicated by Bell, that when misrepresentation by a party is alleged inducing error in the other in regard to some matter, that matter need not be an essential of the contract, but it must be material and of such a nature that not only the contracting party but any reasonable man might be moved to enter into the contract; or; put the other way, if the misrepresentation had not been made, would have refrained from entering into the contract. Such cases as *Blakiston* v. *London and Scottish Banking and Discount Corporation, Ltd.* (1894) 21 R. 417; (1894) 1 L.T. 462; and *Ferguson* v. *Wilson* (1904) 6 F. 779; (1904) 12 S.L.T. 117, seem to me to be based on this view. And I respectfully doubt the soundness of the case of *Woods* v. *Tulloch* ((1893) 20 R. 477) as a decision on relevancy, although perhaps it might have been held after inquiry that the misrepresentation which induced the contract was not of sufficient materiality to justify setting aside the contract.

"The conclusion I come to as regards the present case is that the defender is entitled to rely on any misrepresentation provided that it is material if in fact it induced the defender to enter into the contract, and that it might have had a similar effect on any ordinary reasonable man."[57]

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[57] 1936 S.L.T. 591, at pp. 593, 594.

That this statement of the law, so far as its authority goes, is clear authority for the rule laid down in *Gloag & Henderson* cannot be controverted, but the question remains is it in accordance with the principles of error in Scots law?

If Lord Carmont is right in his analysis of *Menzies* v. *Menzies*, then *Woods* v. *Tulloch* is no longer good law, however much it may be consistent with the indigenous principles of Scots law. Lord Carmont's explanation of *Menzies* rests entirely on his interpretation being correct—*viz.*, " What was there being considered was error existing to a material degree, or on a material but not necessarily essential point, and induced by the misrepresentations of the other party and so leading to a contract." It is submitted that this view is unsound; that it fails to make adequate allowance for the fact that not only was materiality of the essence of *Menzies*, it was materiality going to the subject-matter. The words of Lord Watson make this quite clear, that it was error " with reference to the subject-matter of the contract."[58] If this be so, then Lord Carmont's exegetical juggling with Bell loses much of its conviction. The problem in *Ritchie* was this. According to Bell, error as to quality only gets into the category of essential error " if expressly or tacitly essential to the bargain." Now in *Ritchie* the alleged error was as to quantity, but Lord Carmont felt that he could not hold that quantity was plainly in the contemplation of the parties in the sense in which he read Bell, *i.e.*, amounting to error in substantials. To get over this difficulty he took this quotation from Bell: " That obligations and contracts are annulled or dissolved on the ground either of essential error (section 11), or of error produced by misrepresentation or fraud (section 13 *et seq.*) " and then said, " it being notable that the error which is to be coupled with misrepresentation or fraud is not qualified by the adjective ' essential,' whereas error not so induced must be essential error in order that the contract should be dissolved. If this is the correct reading, then error in quality, quantity or extent, if induced by misrepresentation of the other party, need not be an express term of the bargain or even one that by implication entered into the minds of both parties.'' It cannot be denied that this is a correct reading of the text, for a comma clearly separates off ' essential error (section 11),' from the rest of the sentence. Nevertheless it is submitted that Lord Carmont's reading is unsound on two grounds: (FIRST) Bell never wrote the text which Lord Carmont attributes[59] to him. In the 10th edition the paragraph is enclosed within single inverted commas, and the introduction to the 10th edition makes it quite clear that this text, on which Lord Carmont relies, is an editorial interpolation. The ninth edition makes it clearer still by setting off the paragraph within square brackets. Bell's paragraph in its original form starts off with his famous definition of essential error. Bell never mentions misrepresentation either in section 11 or section 13. Of fraud, he says: " Fraud is a machination or contrivance to deceive, and annuls obligations induced by it. There is in such obligations apparently consent and engagement, but not such as the party defrauding is entitled to rely upon. Fraud is either such as gives rise, or leads to the engagement; without which the engagement would not have taken place. Or such as is only incident to or an accompaniment of a contract, in which independently of it, the parties were engaged. Error by fraud of the former kind, though not in substantials, if induced by stratagem sufficient to deceive a person of ordinary capacity; or accompanied by imbecility and loss on the part of the obligor; or induced in a case in which the obligor relies on the obligee for his information as in insurance contracts; will ground an action for reducing the contract, or an exception in defence against an action grounded on it: error by fraud of the latter kind will give relief by damages only.

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[58] At p. 142.

" There is an important distinction between fraud of the contracting party and fraud of a third party, in which the contracting party does not participate. The former entitles the obligor to redress by exception or by reduction; the latter directs his remedy against the third party." This is the whole of the original section 13. It mentions not one word on misrepresentation. Section 13A is wholly an editorial interpolation. It commences: "An obligation induced by fraud (in the absence of essential error) is not void, but only voidable in the election of the party defrauded . . ." It is not the purpose of the writer to investigate the development of fraud in the law of Scotland, but he is prepared to conjecture that Bell would not have drawn this distinction. He does not deny that so far as fraud is concerned the statement correctly represents the law as it now is, but he believes that when Bell wrote Scots law was somewhat as follows:

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[59] This is quite clear from the words of Lord Carmont: " There seems to me to be no justification for that view in Bell. Indeed in the very section *he* says . . . ."

(a) Essential error as defined by Bell if established rendered the contract void. In many cases the objective test prevented the pursuer from getting into the category of essential error, but the objective test would be negatived if the pursuer could show misrepresentation causing essential error. In short, *Woods* v. *Tulloch* correctly represents Scots law, albeit the references to English law are misleading.

(b) Fraud if it afforded ground for reduction probably rendered the contract void.

(c) Innocent misrepresentation in the English sense was unknown.

(SECONDLY). It is respectfully submitted that Lord Carmont's analysis of the text is defective. What he did was to select one only of the sub-categories of essential error, *viz.*, quality, and apply to it the proposition "error produced by misrepresentation or fraud." But that is not enough; the proposition relied on must also extend to the other four sub-categories, for example, subject, person, consideration or price, nature. To them the proviso "expressly or tacitly essential to the bargain" does not apply, because they are already that. The proposition on which Lord Carmont bases his reading of the editorial text cannot be read as applying to them. If it does not apply to them it cannot apply to quality alone. It is all or nothing. Even if Lord Carmont's reading is sound it gives to " error " a most unfortunate ambiguity. Bell's definition has the merit of definiteness : error must be *in essentialibus* of which there are five categories. Fraud excepted, since it savours more of the law of delict than of contract, there is no room for innocent misrepresentation, and to couple English misrepresentation with Scots error is to lose sight of the essential character of each. That is what has happened in Scots law, and that is why Lord Carmont could rightly say " The law as to the cutting down of contracts seems to me to be in a state of confusion." Why should this confusion have arisen? The answer seems to be because Scots lawyers tended to the belief, and then came to believe, that Scots error was the same as English mistake, and not only the same but that English mistake was confined to *error in corpore*. *Edgar* v. *Hector* is a prime example. The First Division believed that unless the error there alleged was such as amounted to a difference in kind or identity the pursuer failed : hence the metaphysical discussion of Lord President Dunedin. The great misfortune of Scots error has been the enthusiasm on the part of Scots lawyers for treating *Kennedy* v. *Panama, etc., Mail* as an authority in Scots law. Because of this belief that *Kennedy* was Scots error, and therefore restricted to *error in corpore*, and because it was believed that there was no *error in substantia* in Scots law, there has been another tendency to accept from English law the remedy which supplements and, in a sense, enlarges English mistake, *viz.*, innocent misrepresentation. Unfortunately, Scots lawyers still use the same words as Bell used, though perhaps not with the same comprehension. These words are ill-adapted to English technique. The result is that in the field of Scots error there is spoken today a patois besides which medieval Latin is a classical language.

As for Lord President Clyde's observations in *Westville*, they are, it is submitted, based on a defective analysis of Lord Watson's dictum in *Menzies*, *viz.*, " Error becomes essential whenever it is shown that but for it one of the parties would have declined to contract." As has been said above, the operative phrase in the whole dictum is " with reference to the subject-matter of the contract." This, it is submitted, cuts down the unfortunate generality of the more widely known part of the dictum. At one time the writer was of a like opinion,[60] but on reflection he has come to the view that Lord Watson's dictum does not mean what at first sight it seems to mean. Even if he is wrong in this, it is submitted that Lord Watson's dictum construed in the sense given to it by Lord President Clyde is a misstatement of Scots law.

If the submission is correct that there is no clear and unequivocal authority in Scots law for the proposition : " A statement honestly believed may nevertheless, if untrue, mislead the party to whom it is made, and induce him to contract under essential error. This will render the contract voidable "—that is, that Scots law does not contain the English doctrine of innocent misrepresentation. Does it follow that Scots law in the field of error is more rigid than English law in the fields of mistake and innocent misrepresentation, or is Scots error wider than English mistake? The writer believes that the latter proposition is correct. These views are to be found in a recent article " Mistake and Error," [61] from which the following is an excerpt :

" (1) *Error in substantia* (excluding error as to quality) is operative, even if unilateral. That does not mean that mere unilateral mistake always succeeds. The party impugning the contract must aver and prove circumstances which make the error both reasonable and excusable, *justus et probabilis error*.[62] The inductive causes of this error must be pled and proved,[63] and even so he might be barred *personali exceptione.*[64] Clearly, therefore, if, as in sale the parties are at arms length, yet if the one has knowledge that the other is mistaken or in ignorance as to something which is in the substantials, and takes advantage of that mistake or ignorance, the sale is void. This, as Professor Lawson argues,[65] is the decision of the Inner House in *Steuart's Trs.* v. *Hart.* Professor Gloag has written, 'When a book is exposed for sale in a bookstall it is generally supposed that a collector may buy it at the price asked, though he knows that it is rare and valuable, and must know that the bookseller is unaware of its value, and yet, in all essential points, such a case is on all fours with *Steuart's Trs.* v. *Hart.*' [66] It is submitted that whereas in *Steuart's Trs.* v. *Hart* the error was as to the price or consideration, in Professor Gloag's example it is as to quality, and, therefore, he fails to take this essential distinction that, on our hypothesis, such error is inoperative unless shared by the parties and of the substance of the agreement.

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[60] *Vide* " Mistake and Error," *International and Comparative Law Quarterly*, Vol. 1, 1952, p. 472, at pp. 481–2.

[61] *Loc. cit.* at pp. 478–9.

[62] *Cf.* Lee: *The South African Law of Obligations* (1950), s. 43.

" (2) Error as to quality, amounting to *error in substantia,* as explained above, and shared by the parties is operative.

" (3) Misrepresentation in the English sense of 'innocent misrepresentation,' is not a distinct category in itself but merely one of the inductive causes of the error. In this sense must be understood the acute, but ambiguous, remark of Richard Brown in his celebrated *Treatise on the Sale of Goods,* that, 'In Scotland misrepresentation and mistake are included in the phrase " *error in essentialibus.*" ' [67]

" (4) If unilateral *error in substantia* is operative *a fortiori* so is mutual error.

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[63] *Vide* the observations of Lord President Inglis in *Hare* v. *Hopes,* 1870, 8 S.L.R. 189, and of Lord Justice-Clerk Moncrieff in *Munro* v. *Strain* (1874) 1 R. 522, and of Lord Sands in *Fletcher* v. *Lord Advocate,* 1923 S.C. 27; 1922 S.L.T. 585.

[64] *Vide* Lord Shand in *Steuart's Trs.* v. *Hart* (1875) 3 R. 192.

[65] " Error *in Substantia* " (1936) 52 L.Q.R. 79.

[66] *Law of Contract,* p. 438: *vide* Lawson, *op. cit.,* p. 101.

[67] p. 412, 2nd ed., 1911 (Edinburgh, Green).

" (5) Error always nullified consent, and the agreement is always void.

" On this basis Scots law is poles apart in method and content from English law, although the results may well be roughly analogous."

These observations are, of course, generalisations, but is is considered that they represent what, at least, was Scots error.[68]

J. J. Gow.

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[68] The writer considers that the nature of the difficulties which beset Scots error demand for their understanding some historical investigation. An excellent guide is Professor F. H. Lawson's scholarly article, already referred to, *viz.*, " Error *in Substantia* " (1936) 52 L.Q.R. 79. The most recent exposition of English mistake is to be found in Cheshire & Fifoot, *op. cit.* (3rd ed.).

THE LEGAL THEORY OF THE STATE

ONE of the deficiencies of legal theory both in England and in Scotland is an adequate legal theory of the State which takes account of modern social, political and economic developments as well as of the true legal position. Of philosophical and political theories of the State there are abundance, but the theory here sought is a purely legal one, which gives an adequate legal explanation of the juristic nature of the State as the immediate practical source of many fundamental rights and the object of as many fundamental duties.

English and Scottish law have both in the past not been famous for their theoretical discussion of the bases of doctrines and no adequate theory at present exists in either system. In spite of the fact that for many purposes, and certainly in the eyes of International Law, England and Scotland are, with Northern Ireland, a single political State, it is possible that the two legal systems should have slightly different ideas of the juridical nature of that State and it is notorious that in the department of law which may be called Crown proceedings, the laws of the two countries are not exactly the same.

The subject like many more in law, is bedevilled with faulty terminology. In the first place the word State is not very commonly used in law at all : this may represent an antipathy to Marxism but it is interesting psychologically that State agencies and institutions are usually called by any other adjective. There are National galleries and museums, British Railways, Her Majesty's Forces, the Royal Navy, Crown lands, Government Annuities and so on. Again while the National Debt is a State affair the National Trust is not. One of the few examples of the British use of the word State seems to be in connection with areas under the Forestry Commission, which are labelled " State Forest." This variety of adjectives reflects the lack of a coherent legal theory and also the haphazard historical evolution of our institutions. There is no harm whatever in the names so long as they do not blind us to the realities of the legal position. Indeed it is better that old and honourable institutions should continue to bear their old familiar names and it also avoids the monotony and the unpleasant emphasis on the all-pervading presence of Leviathan which would arise from saddling all these bodies and agencies and premises with the adjective " State."

The antiquated terminology does, however, help to confuse the issue and in a time when the national interest is exalted and national or governmental enterprises of every kind are being created the matter should be clarified. Not least is the reason that the Crown Proceedings Act has so modified the legal position as to render a modern theory which takes account of the actualities of the present situation both necessary and possible.

To proceed, then, with an examination of the terms which may be material to this issue, the first is " The Queen."

The term " The Queen " means in the first place the monarch or sovereign personally, as an individual, but there are clear instances where the term is used for what is, in fact, the State. For example, in England an indictment proceeds at the instance of the Queen but it is trite that this masks the fact that the prosecution is being carried on, not by Her Majesty, but by a representative of the State in the public interest for the general good of the community. It would be more logically and legally accurate to use the style *The State* v. *Crippen* or *The State* v. *Ruxton*. Similar to this is the Scottish usage where an indictment runs in name of A.B., Her Majesty's Advocate, again clearly as acting in the public interest, and not on behalf of the monarch personally, though such was originally the case. This use is clearly an historical survival.

Allied to the term " The Queen " is the term " the Crown," which by reason of its greater abstractness is much less objectionable in theory and indeed, for countries long habituated and still attached to monarchy is quite a suitable term for the State. But the Interpretation Act, 1889, s. 30, defines the word as " The Sovereign for the time being " and thus equiparates it to The Queen, or at other times to The King. This usage does not seem to be very closely followed however. The Crown Suits (Scotland) Act, 1857, s. 1, refers to the Crown as meaning The Crown and the Public Departments. The Petroleum Production Act, 1934, s. 1, vests petroleum in its natural state in " His Majesty." But the idea of the Act was surely to vest these natural resources in the State, or at least in a public department of the State in trust for the community. More important is the Crown Proceedings Act, 1947, which provides (s. 2), that " the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject." It is surely absurd to maintain the fiction that this has anything to do with " the sovereign for the time being." It means the State.

The term " The Government " may next be scrutinised. This phrase causes less trouble than most in that it is rarely used in legal connections, but more in political. Even so it must be watched, as it has at least two senses, the broader in which it signifies the whole apparatus concerned with the running of the country, which indulges in practically every form of activity known to man. Secondly there is the narrower and exclusively political sense which designates the body of politicians in the House of Commons who have for the time being a majority and are exercising a directing influence over the policy and actings of the bodies which are in the aggregate called the Government in the first sense of the word. The antithesis to the first sense is " the common people, the governed," to the second sense " the Opposition." The term " The Government " could not, moreover, properly be applied to the State as it clearly presupposes a governed element in addition and therefore does not purport to be a synonym for the whole entity of the

State. One does, however, come near to this position in the phrases Government Departments or Departments of State. The second of these certainly carries a hint of the idea that the Government is the State.

The existing legal theories of the State in British law are something less than satisfactory. Salmond [1] takes the view "that the community of the realm is an organised society but it has no person or body corporate. It owns no property, is capable of no acts, and has no rights nor any liabilities imputed to it by the law. . . . Public property is in the eye of the law the property of the King. . . . Whatsoever is done by the State is in law done by the King."

It is interesting that so far back as 1901 Maitland [2] suspected that it was not an adequate theory to identify the King and the State. Not the least difficulty today is to determine whether or how the Queen has a split juristic personality for the different parts of the Commonwealth. Similarly the conception of a corporation sole may be a reasonable legal explanation for the Queen in her public capacity (at least in England) [3] but there can be confusion arising from the identification of the Queen as a corporation sole and the State.[4] The fact that oaths are taken and allegiance owed to the Queen and not the State does not decide the matter as this practice is both traditional and natural, to owe obedience to the permanent head of the body rather than to the abstract body.

It remains to seek to work out a reasonable working juristic theory of the State applicable to British conditions since 1947. The State, let us say, is a corporation aggregate consisting of all those persons connected with the defined area of Great Britain and Northern Ireland and their territorial waters by ties of nationality and domicile, associated therein for legal and political ends with a view to the maintenance of order and justice and the promotion of their own material and cultural advancement. This corporation has a managerial body called the Government which comprises (i) an hereditary official variously called The Queen, the Sovereign, the Monarch, the Crown, and (ii) a body of directors chosen from the legislative assembly called variously the Government, the Cabinet, or the Heads of State. The managerial body acts in the interests of the persons who form the corporation through (a) a legislative assembly partly hereditary and partly elected by the adult members of the corporation, (b) a body of executive and administrative officials with departments and subordinate staff, and (c) a number of individuals empowered to adjudicate on disputes and apply to individuals the rules of law. The adult members of the corporation have periodical opportunities to change the elected element of the legislative assembly and such changes may result in changes in the body of directors and in the policy of the board. The corporation may sue and be sued by its members and it proceeds against its members for the repression of certain acts declared dangerous or harmful to itself or to the interests of the members generally.

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[1] *Jurisprudence*, 10th ed., 340.

[2] The Crown as Corporation, 17 L.Q.R. 131.

[3] The theory of corporation sole probably does not exist in Scots law: see Stair, II, 3, 41; Ersk. I, 7, 64; Bell, Pr. § 2176; *Glasgow University* v. *Faculty of Surgeons*, 1837, 15S. 736; 1840, I Rob. 397.

[4] Paton, *Jurisprudence*, 2nd ed., 279.

Within this corporation are smaller corporations some formed by groups of the members to promote various interests and some formed at the instance of the directors to effect certain of the functions of the corporation, such as the management of certain resources or to provide the members with services of certain kinds. Some again exist to exercise some of the executive and administrative functions of the corporation within subordinate areas and these are managed in part by members representative of that area. In legal terminology the corporation is still frequently called the Crown, an historical survival from the time when the members were all subjects of a monarch and powers and rights vested in him personally.

Salmond[5] contended that the real personality of the King had rendered superfluous any attribution of legal personality to the State itself: everything flowed from all citizens being fellow-subjects of one sovereign lord. This is so much a fiction that it is time it was abandoned. Such is in baldest outline a statement of the corporation aggregate theory of the State and it is submitted that for legal purposes it is a reasonably working theory answering to modern British conditions. It purports to be a legal theory only and no account is taken of philosophic or political considerations in its formulation.

How would acceptance of such a theory affect the Commonwealth? It seems that it would work very well and avoid certain existing difficulties. The States of the Commonwealth are probably themselves bodies corporate. Australia certainly is for at least some purposes. They are then independent personae in international law but they accept as supreme head of their respective governing bodies the same person who is the permanent director on the governing board of the United Kingdom.

Nor need this theory affect accustomed legal and political conventions and forms of speech. The Sovereign remains the permanent chief manager of the corporation (at least nominally) and continues to summon " her " Privy Council and Cabinet and to govern in accordance with their " advice " and representatives of " Her Majesty's " Government put the views of the United Kingdom before the United Nations.

In legal connections is the attribution of this corporate personality not merely to recognise what is now the true state of fact and the actual state of the law? In *Sloman* v. *Government of New Zealand*[6] an action was brought against the Governor and Government of the Colony of New Zealand. It failed as there was no such person or body corporate known to the law. But precisely that kind of thing is now permitted by the Crown Proceedings Act, 1947, save only that an action is directed not against the Crown or the State or the Government in general, but against the Ministry or Department concerned, or (in Scotland) the Lord Advocate as representing that Department. In short, the 1947 Act has so changed the position as to justify the attribution of corporate personality to the State, as distinct from the monarch, in British law. *Tempora mutantur, et nos mutamur in illis.* Legal theory changes too with the times.

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[5] *Op. cit.* 341.
[6] (1876) 1 C.P.D. 563.

DAVID M. WALKER.

PROPERTY IN RELATION TO MARRIAGE AND THE FAMILY

III. *The Channel Islands,*
with a final note of comparison with Scotland

A.—General. The rights of spouses and children in moveable property, both as they were before the respective Married Women's Property Laws of Jersey (1925) and Guernsey (1928) and as they are today in each of the four main islands, are set forth at length in the *Note on the Parts of Personal Property* published in the *International and Comparative Law Quarterly* in April this year. In Guernsey they are now practically identical with those in Scotland, though an historic difference in Jersey law has apparently checked there the kind of changes carried out in Scotland and in Guernsey to bring the claims into complete harmony with the possession by wives of separate moveable property.

Channel Island usage before these modern Acts was however like that in Scotland after, not before, the Intestate Succession (Scotland) Act of 1855. Wives did not make wills (except as noted below) nor did their part descend to their relatives if they died before their husbands; their claim to a third if there were children and half if there were none began on the husband's death. On the other hand, the possibility of and, in Jersey, frequent recourse to *séparation quant aux biens*, which was traditionally not dependent on separation *a thoro et mensa*[1] though it became so in modern Guernsey usage, was a mitigation of the husband's rights there not enjoyed by wives in Scotland, and such separation of goods gave the wife the power of testament, not of a proportion of the joint goods but of those judged to be her own. It also gave her children a claim to *légitime* from the mother's goods, which seems always in the Islands (in contrast to Scotland) to have been enjoyed by the children of widows.

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[1] It seems customary to use these Latin nouns in this order in the Islands.

The life interest of the spouses in each other's land is closely similar to courtesy and dower or terce in Scotland, and formerly in England, not equal like Manx widowright in land. The different claims of the two spouses, each on the land of the other, are more exceptional in Europe than people accustomed to the English or Scottish common law always remember. Even in England, so to speak under the Norman surface, a more equal system cropped up here and there, in the Freebench of Kent and some scattered manors elsewhere. While however in the Channel Islands, again as in Scotland and England, the wife's dower of a third interest in her husband's land, does not lapse on her remarriage, the husband's *droit de viduité* to the use of the whole of his wife's land continues only so long as he remains a widower, as (for both sexes) in Man.

To a student accustomed to the straight primogeniture which early became characteristic of England and Scotland, and of Man, inheritance of land in the Channel Islands seems confusingly complicated, especially as it has never been simply divided equally, a larger share (though not exclusive rights) being given to males (now abolished in Jersey) and a privilege of eldership to the eldest son together with responsibilities of administration. Among other results, the unequal division of land between sons and daughters long influenced in Jersey by a kind of infection the division of moveable property. Such details, including the rights of eldership, differ in the two bailiwicks, and to some extent in different periods. Alderney and Sark fall in the bailiwick of Guernsey and share its customary law. In the case of Sark, this was officially declared in 1584, much against the desire of the Seigneur and tenants, who, as will be seen, had then recently settled that island from Jersey. Statutory changes in Guernsey law do not extend however to Alderney or Sark, except with their deliberate approval and consent, so that each has its own distinctive features today.

Both the general character of Channel Island customary law and the sources of information about it are bound up with the position of the Islands as part of the Duchy of Normandy, whose Dukes became Kings of England. The traditional Island laws and customs are variants of those of Normandy. Though separated politically from continental Normandy when this was lost to the English crown in 1204, they were still Norman both in their own and in English eyes, since, as Coke puts it: " The possession of these Islands, being parcel of the Dutchy of Normandy, are a good seisin for the King of England of the whole Dutchy."[2] When they set out to state their laws they did so, not *ab initio*, as in the Isle of Man, but as a matter of resemblances to and differences from the Custom of Normandy. A large part of Channel Islands customary law has accordingly to be found in Norman Customaries and other continental documents. Much scholarship has been expended on this material and is still being expended from this angle on Channel Island usages, now that they are the only remaining (avowed) representatives of Norman customary law which was swept away on the Continent by the French Civil Code. Thus there is much to study lying behind Channel Island customary law and much that has been written about it (chiefly in French and published either in the Islands or in France), and relatively little before comparatively modern times in the way of local original documents stating it directly, particularly in its private or domestic aspect.

Wills do not provide such a wealth of illustrative material as in the Isle of Man and in Scotland. None are recorded before the late seventeenth century and most of those from that time seem to have been made by those residents whose property was largely in money, shares, or investments, some of whom had interests outside the Islands. The Channel Islands seem always to have shared the popular French aversion to the practice of the last testament and insistence that all children, or at least all those of the same sex, should fare alike, as in intestate succession. Such insistence was a matter of binding custom in Guernsey until the nineteenth century, when it was deemed necessary to make its abolition clear by statute.[3] Naturally in consequence there were even fewer wills in Guernsey than in Jersey. Jersey wills do in a number of cases refer to the wife's or children's undefeatable claims " by the law of this island." In Guernsey the insistence on children being treated alike made it unmeaning to mention them in wills at all.

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[2] Sir Edward Coke (1549–1634): *Institutes*, Part IV, Cap. 70.

Such differences between the Islands must be observed. More important to comparative law is however the overall picture of the life interests in land so similar to courtesy and terce, and still more of the three-fold division of personal property after the death of the husband and father, and the contrasts with Scottish traditional practice, in the absence of any distribution on the prior death of the wife, and on the other hand the possibility and practice of *séparation quant aux biens.*

B.—The Channel Islands and the Customary Law of Normandy. When the Normans came to the province to which they gave their name, they found it, and the islands lying off the coast of the district called the Cotentin, in the hands of Bretons. The Cotentin became Norman in A.D. 932, after a Breton revolt had been put down by William Longsword, successor of Rollo, first Duke of Normandy, who had received a grant of part of the province in 911 from Charles the Simple. He parcelled out both the mainland of the Cotentin and the Islands among his supporters. It is conjectured, from the prevailing physical type of the population, that this fertile region was attractive not only to the great lords, but to the rank and file of their followers, and that accordingly the Bretons and the earlier inhabitants were more largely (though no doubt not entirely) cleared out from the Cotentin and the Islands than from the neighbouring regions, so that they became racially the most

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[3] *Loi relative à la Portion Disponible des Biens Meubles des Pères et Mères*, 1872. Accepted by Alderney same year. Amending *Loi*, not extended to Alderney, 1929.

Norman part of Normandy. The law or custom therein however shows little sign that the people occupying the country came originally from the same quarter of Europe as those who conquered Man. William Longsword's professed intention not to alter but to preserve the customs of the country seems to have been fulfilled in practice. Recent research has tended on the whole to minimise the Norse element in early Norman customary law and to class this as one among the several French customs, not in the earliest stages more different from the rest than they were from each other. Later, important contrasts between Norman and other French law were to be insisted upon, partly perhaps as a manifestation, not necessarily conscious, of Norman separateness and individuality. How early this happened is however uncertain.

Up to 1204 the Islands were linked to the continental mainland socially by the fact that many of the Norman tenants-in-chief held estates on both sides of the narrow water, and also administratively by their status as bailiwicks of the Duchy with bailiffs appointed by the Duke. They were also then and for long afterwards part of the diocese of the Bishop of Coutance. These facts do not imply that the customary law administered there was absolutely uniform. The customs of the country varied in minor respects from bailiwick to bailiwick in continental Normandy, and so they did and still do in the Islands. This was one of the difficulties experienced by English monarchs and their representatives from the thirteenth century onward in discovering—and so to speak pinning the islanders down to—a recognisable system of law. Willing and ready to recognise island law, they did, they felt, need to be informed what it was, or the people could hide behind it and do as they pleased. So a Royal Mandate was issued on September 16, 1299: "To the knights, freemen, and other tenants of the Islands of Jersey, Guernsey, Sark, and Alderney, to cause their laws and customs to be distinctly drawn up in writing . . . as the men of those islands frequently complain that the king's bailiffs and ministers abuse their laws and customs in many ways."[4] Ten years later, William de Mareys, the King's Attorney from England, put his finger on three points which have perplexed students of Channel Island law since his day :

(i) the lack of uniformity between the Islands themselves in their laws : " the islanders here (in Jersey) . . . have assumed to themselves . . . certain things which they use, which altogether disagree with the laws and customs of the other islands, and this as well in the law of inheritance, dower, and . . . weight and measure " ; (ii) their readiness to claim as an authority a presentation of the law by what was now a foreign writer ; they " have assumed a new suit of a certain treatise which . . . a Norman had made some time after the Normans had receded from the faith of our lord the King of England " ; and (iii) their, superficially wilful, selection among the contents of such an authority ; they " follow in the things which please them and omit other things."

The treatise, which the Jersey people called *Mancel's Summa*, presumably after a conjectured compiler, is believed to have been the *Summa de Legibus in Curia Laicali*, or, as it is more often called, *Grand Coutumier de Normandie*. This appears from internal evidence to have been compiled both in Latin and in Norman French towards the middle of the thirteenth century.

The representatives of Jersey, in 1309, do not seem to have replied to the first point. It is seldom discussed to this day, the Islands being concerned each with their own laws and often appearing to be oblivious of each other's, at least as between the bailiwick of Jersey and that of the rest of the Isands. They did however reply characteristically to the two other questions, by claiming the age and permanent character both of the contents of the treatise in question and of their customs in general, while at the same time they submitted a brief schedule of what they regarded as their chief local variations: " they and their ancestors have used such customs as they now claim. And they say that they greatly look to the aforesaid *Summa* . . . because the laws of Normandy are well contained in it." [5] These are the true replies though they have not always been understood by English critics or even by the jurists in the Islands. Except where consciously altered by authority inside or outside the Islands, which happened rarely in early though frequently in recent centuries, the fundamental customary law of the islanders is largely, and is assumed to be entirely, that which they and their ancestors have used at least since Normandy and England owed allegiance to the same prince: traditional variants of Norman law, not capricious selections from it. The Norman treatises which they so often quote, from the *Summa* which was already in use in Jersey at the beginning of the fourteenth century, to the commentaries of the sixteenth, seventeenth and eighteenth, are respected because it is assumed that in them are well contained the Norman laws, which are accepted as fundamentally unchanging, though they may be elucidated by later comments and decisions and even developed by their own natural growth to meet new circumstances.

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[4] *Patent Rolls*: noted among records in Seigneurie, Sark. Access to these records was granted by the courtesy of the Dame of Sark.

When de Mareys stated that the Jersey people had assumed customs " which altogether disagree with the customs of the other Islands," he left it to be assumed that these other islands kept more closely to what he called " the ancient customs " and made no suggestion that they too used the *Summa* which he regarded as an innovation. Four hundred years later Poingdestre [6] declared that the people of the Islands " replied in one voice, both those in Guernsey and those in Jersey, that their laws and customs were those comprised in the Coutumier," but he seems to have been mistaken in this and in his apparent assumption that even the articles set down as exceptions were applicable to both. Actually the Guernsey people made a distinct and quite different declaration that same year, 1309, namely that their claim was to be governed " neither by the law of England nor by the law of Normandy but by certain customs observed in their island from time immemorial." [7]

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[5] De Marey's report, and answer of Jersey people, received by the King's Justices in Eyre (Circuit) 9/6/1309.

[6] Jean Poingdestre: *Les Commentaires de L'Ancienne Coutume de Normandie*, written probably after retiring from the office of Lieutenant-Bailiff of Jersey in 1676, published, Jersey, 1907, Preface.

In the mid-nineteenth century, a Royal Commission, after having heard evidence in both bailiwicks, noted that their customary law was not precisely the same, and committed themselves to the explanation " the Grand Coutumier of Normandy never having been received as law in Guernsey to the extent it was in Jersey." They went on to say that Guernsey " probably was at all times governed by a local custom." [8] It may well have been the case that, as apparently in 1309, so for the next two, or two and a quarter, centuries the *Summa* or *Grand Coutumier* was available and was regarded as relevant to the administration of law in Jersey and was not in the other Islands, but the Commissioners probably exaggerated the effect of this in producing the differences between Jersey and Guernsey customary law.

These seem sometimes to be different versions of the same variation from the continental practice; for instance, both in Jersey and in Guernsey, the eldest son had a greater advantage than on the Continent, but the advantage was worked out differently; similarly daughters were at a disadvantage as compared with sons, less in both bailiwicks than on the Continent, but not exactly the same in each. Other differences seem rather to have arisen from a different interpretation of the same Norman custom, and to have increased rather than lessened after the *Coutumier*, printed and edited for use in court, was undoubtedly known in Guernsey as well as Jersey. This was partly because one particular presentation and commentary became quasi-statutory in Guernsey. On the whole however the differences between the customs of the Islands are due to the fact that they have evolved from ancient usages which, while belonging to the same family, were never identical twins, in circumstances keeping them true to the general character of the Norman law but allowing development and minor change, while meantime each bailiwick seldom took heed of what was happening to the law of the other.

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[7] *Rolls of the Assizes*, published by the *Société Jersiaise.*

[8] *Second Report of the Commissioners: Guernsey*, 1848.

The exhortation to the Islanders in 1299 and on subsequent occasions to set forth their law was unavailing, except for the brief though important Jersey statement of 1309, until the eighties of the sixteenth century when the pivotal document for Guernsey was produced. Earlier references to the content of private customary law in the Channel Islands, as contrasted with matters concerning Island administration and privileges, are of the scantiest. The so-called *Constitution of King John*, produced on the demand of Henry III in 1248, mentions, as within the competence of the Island courts, pleas relating not only to dower but to *mariage encombré*, a characteristically Norman phrase and idea, though possibly current in England also at the time. One point of Island custom was sufficiently surprising to the English to evoke a royal inquiry in 1369, which sets forth the characteristic practice of *retrait lignager* and will be quoted later.

Towards the end of the fifteenth century the *Summa* or *Grand Coutumier de Normandie* appeared in print and there was a series of editions in the early decades of the next century. From the first they were usually accompanied by a running commentary commonly referred to as the *Gloss* (*la Glose*), which probably dates from the fourteenth century. The most famous and comprehensive editions were those of Guillaume le Rouillé of 1534 and 1539,[9] of which the latter, at least, contains, besides the *Gloss* and a series of edicts of the Parliament of Rouen, and of French kings relating to Normandy, a document probably of the late fourteenth or early fifteenth century, entitled *Le stille de procéder en*

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[9] Available in National Library of Scotland: passages from the *Gloss* and the *Style* here cited may be found therein.

pais de Normandie (cited in English as the *Style*). This is important as containing the earliest direct statement about testaments and the parts of widows and children in Norman usage. Le Rouillé's work was presumably used in Jersey courts soon after its appearance. It was probably known in Guernsey also.

When, however, a Royal Commission, appointed in 1579 to look into affairs in Guernsey, asked how far Guernsey accepted the Norman law, and a statement of acceptances and differences was produced, it was not le Rouillé's or any other straight edition of the *Grand Coutumier* that was used. In the meantime there had appeared, in 1574, the first and most important commentary on the Norman law as it was before its revision in the following decade, Guillaume Terrien's *Commentaires du Droit civil tant public que privé observé au pays et Duché de Normandie*. This, though it quotes the *Summa* extensively and often verbatim, rearranges its material, supplements its argument, and fills in its gaps, by the use of the *Gloss*, the *Style*, judgments in the Norman courts, and edicts of the French kings.

The full title of the Guernsey statement is *Approbation des Lois, Coutumes, et Usages de l'Île de Guernesey différentes du Coutumier de Normandie d'ancienneté observé en la ditte Île*; it has been known ever since as the *Approbation des Lois*, or, still more briefly, as *notre approbation*. Terrien's name is not mentioned, but internal evidence and subsequent reference show that it was his treatise the Guernsey people had before them and treated as the repository of the Coutume observed from of old in their island. They treated it as if it were a straightforward statement of the Custom of Normandy, going through it chapter by chapter, sometimes stating the Guernsey practice where they recognised its indigenous character, but often contenting themselves with declaring " Nous usons du—chapitre " or, sometimes " Ce chapitre n'est en usage en cette île," or, more shortly, " Chapitre— : Nihill." Such was the work which was eventually laid before the Queen in Council and ratified as a presentation of Guernsey law in 1583.

In spite of criticism of the *Approbation* and even of Terrien in Guernsey in the early [10] and middle [11] seventeenth century, the English writer Warburton declared in 1682 [12]: " the authoritative edition in that island is that of Terrien," and the Jersey jurist, Le Geyt, referred soon afterwards to " Guernsey, where they have made of that author a kind of written law." [13]

Meanwhile Poingdestre remarked in Jersey, " Our cousins of Normandy have left the ancient custom, having made themselves a new one " (the *Coutume Reformée* which was drawn up by 1583 and ratified by the Parliament of Rouen in 1585). He continued, " Our practitioners remain suspended between the old and the new without knowing which to follow." [14]

Poingdestre himself and his successor in the office of Lieutenant-Bailiff, Philippe le Geyt, did much to clarify and settle Jersey law, but there was no general official pronouncement for Jersey between 1309 and 1771.

In 1771 a " Collection or Code of laws agreed upon by the states of the Island " was ratified by the King in Council. The purpose was apparently to put the statutes, ordinances, and regulations of Jersey, on a clear constitutional basis, calling attention to and ratifying or re-ratifying those of lasting value and cancelling any others, and so to clear the way for orderly constitutional practice in the future. The customary law is only touched upon to a small extent. By far the most important contribution to its understanding to be found in the " Code " is the setting forth of the special claims of the eldest son (or daughter if there is no son) in the partition of land among co-heirs.[15]

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[10] *e.g.*, in request of the people for review of *Approbation* 1605, and call by Privy Council for new statement, never produced. See also Nos. 3 and 77 of cases brought before Royal Commission in 1607, in pamphlet in Priaulx Library, Guernsey.

[11] Thomas le Marchant: *Remarques et Animadversions sur l'Approbation des Lois et Coutumicr de Normandie usitées es jurisdictions de Guerneze*, circa 1650.

[12] *Treatise on the History, Laws, and Customs of the Island of Guernsey*, 1682. Translated into French and edited 1831.

[13] Philippe le Geyt: *Manuscrits sur la Constitution, les Lois, et les Usages de Jersey.* Written circa 1700, published, Jersey, in 4 Vols. 1846–7. IV. p. 434.

[14] *Les Commentaires de L'Ancienne Coutumier de Normandie*: Preface.

There are important modern statutory changes to be studied in both bailiwicks, from 1834 in Jersey and from 1840 in Guernsey. Most of the customary law there, as in other British countries, remains uncodified and much of it unaltered by statute. Except, however, for the *Approbation* in Guernsey in 1583 and the partial Code in Jersey in 1771, neither of which was intended to change the customary domestic law, nearly all the relevant legislation has been put through in the past 120 years. There was, as will be seen, one early drastic change, effected in Sark by James I in 1612, but even that was camouflaged by the declaration that the custom then abolished there had been " against Law."

C.—Aspects of the Customary Law of Normandy and of the Channel Islands. (1) *Property in Land* : *Retrait Lignager.* The Royal Order of 1369 already mentioned was addressed " to the keeper of the Islands of Jersey, Guernsey, Sark and Alderney " and asked " if it is true, as the king is informed, that there is a custom in the said islands, whereby, if anyone shall put up his land for sale, and his heirs or next of blood within a year thereafter shall come and offer him as much therefor as another would give, then the heir or next of blood shall be admitted to buy the land." [16] It was true and *retrait* was practised in Jersey until abolished by statute in 1834, and is still practised in Guernsey, though in a modified form, to this day.

This is a good example of the less drastic attitude of the twentieth than of the nineteenth century towards traditional restrictions on the free disposal of property. The leading mid-nineteenth century Guernsey jurist, Peter Jeremie,[17] called the system " fundamentally vicious." When however, in 1923, nearly ninety years after Jersey, Guernsey dealt with *retrait* by statute, she did not abolish it, though she reduced the competent period to one month and the competent relationship to descendants, brothers and sisters, and nephews and nieces for inherited land (propres) and to descendants only for acquired land.[18] This change has never been extended to Sark; an earlier, wider system of *retrait* still obtains there.

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[15] *Jersey Code*, 1771, pp. 215–16 (not to be confused with the unofficial *Code Le Geyt* of 1698).

[16] *Fine Rolls*, March 1, 1369, noted among records in Seigneurie, Sark.

[17] *On the Law of Real Property in Guernsey*, pp. 163–4, 2nd ed., 1866 (1st ed., 1841).

(2) *Property in Land: Inheritance: Sons, Daughters, and the Eldership.* The *Summa* opens the discussion of the partition of land by the general distinction: " All heritable property is partible or not partible." [19] It goes on to define the two kinds of holding, the noble, listed and summarised as " those in which the lord has the guardianship of the heirs," which were not partible among sons though in the absence of sons they were divided among daughters, and the partible holdings of commoners " in which the lord cannot claim guardianship." Glanvill's distinction between lands held by knight's service and soccage land may be recalled [20]; but the formal is greater than the actual resemblance, as we are clearly here at the parting of the ways. In England the aristocratic practice of primogeniture was already becoming the norm, and even land held in soccage was only excluded if it " had been anciently divisible," while in Normandy even *fiefs nobles* were distributed to different sons if the parents held more than one, while the partition between brothers of the holdings of the common people (roturiers) was always of great social importance. The eldest son had certain, carefully limited, rights, and special responsibilities set forth as follows: " The chief house remains to the eldest son, with the court yard, and garden, on condition he gives his brothers fair value for it. Everything else is divided equally. . . . The eldest should choose first. . . . And the eldest

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[18] The power of *retrait* in Guernsey was temporarily suspended in 1941 on account of the special conditions of the time.

[19] XXVI. *De Portionibus: De Parties d'Héritage: L'Ancienne Coutume de Normandie,* W. L. de Gruchy, Jersey, 1883, pp. 79–87.

[20] *Glanvill,* VII.3. *Reg.Maj.*II.27.

brother holds until the younger demands, for the eldest is responsible to make partition to his juniors."

As for sisters, the same section of the *Summa* sets forth that any already married could only demand what might have been promised them by way of marriage portion (Scots *tocher*),[21] while the unmarried could " claim no part of the heritage but could claim their tocher. And if the brothers can marry them with moveable property without land or with land without moveables, that must suffice them," so long as it can be done " without disparity," or, as set forth later in the section, " to a suitable person according to his birth and his possessions." On the other hand, " If they (the brothers) will not marry them, they shall have a third of the heritage (as explained later of the direct line only) in lieu of tocher," unless there are so many more brothers than sisters that this would make the individual sister's portion the greater, " for no sister should have a part larger than her brothers."

As time passed, the usages in the Channel Islands diverged from those of continental Normandy in two chief ways : the rights of the eldest son were so increased as to give him a position between continental near-equality with his brothers and British primogeniture, and the sisters' third share of land (still with the same limitation that it must not make a single sister's portion more than her brother's) had become detached from the purpose of tocher and made generally claimable.

Probably the first step in the aggrandisement of the position of the eldest son in the Channel Islands was the lapse of the condition that he must give his brothers " fair exchange for the value " of the chief house and its appurtenances, and the reckoning of the areas covered by these as though they were naked ground. This made it profitable that they should be as large and include as many valuable and choice pieces of land as possible.

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[21] This Scottish term is convenient as avoiding both the cumbersome *marriage portion* and the possible confusion of *dowry* with *dower* (the two meanings of *dos* in medieval Latin). It is hoped accordingly that its use here throughout as equivalent to the Latin *maritagium* (Norman-French *mariage*) will not confuse readers unaccustomed to the Scottish usage.

That this process was well under way in Jersey at least a hundred years before he wrote in 1698 seems to be indicated by Le Geyt: The eldest is entitled to take a part in advance, commonly called a *preciput.* This preciput was formerly a House, if there was one, with courtyards before and behind, kitchen garden, and surroundings, pretty much what is called in some countries the Vol du Chapon.[22] But during this last century preciputs have been increased, and it is regarded as a reasonable offer if the younger brothers are willing to leave to the eldest the tenth part of the free heritage whether in land or income (rentes) besides the house, barn, and kitchen garden.[23] In the *Code* of 1771, the land allowed to the eldest son before his special tenth part was thirty perches for a kitchen garden and four vergées, except in the towns of St. Helier and St. Aubin.[24]

In Guernsey *before* the division into individual portions the brothers could claim a twentieth of the area, chosen at their pleasure so long as it was outside the boundaries of the town of St. Peter Port. Of this the *Approbation* [25] declares " if there is a house or houses, mills or other buildings or gardens, they shall only be reckoned like other ground," and only limits their choice by saying that having begun on any special ground they must keep to it, or to adjacent land if it is not enough. This limitation seems to have been soon dropped. The eldest next chose his lot, usually including in his choice the brothers' twentieth, which naturally under these conditions included the most valuable buildings and fields, and presumably these were still reckoned " like other ground."

It is interesting to observe that the seventeenth-century jurists in both bailiwicks, Le Marchant in Guernsey and Poingdestre in Jersey, regarded the trend in favour of the eldest son as unfair. Poingdestre notes emphatically its divergence from the Norman custom and says that any who have tried to adjust the latter " à notre pratique auroit entrepris de faire un habit à la lune."[26] Neither Le Marchant nor Poingdestre mentions the example of England, the pressure exercised by James I (and VI) and his successors in Sark, or the abortive introduction of the power of entail in Jersey by statute in 1619. And yet, lying as they do, both socially and geographically, between Britain and the Continent, it was not surprising that, in so legally and administratively important a sphere as succession in land, a system part way between those characteristic of Britain and the Continent respectively should have come into being in all the islands, except Sark, where straight primogeniture like that in Britain was imposed from above.

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[22] Literally " Capon's flight," a French term for the grounds of a country house.

[23] *Privilèges, Lois, et Coutumes de l'Ile de Jersey* (" *Code le Geyt* ") finished 1698, published for the Jersey Law Society, Jersey, 1953, p. 52.

[24] 2¼ Jersey vergées = one English acre. 40 Jersey perches = one vergée.

[25] *Approbation*, p. 15, on Terrien, VI. 13.

Sark was recolonised on being granted, in 1565, by Queen Elizabeth to Helier de Carteret, the leading Jersey seigneur, and his heirs. He received it on condition that " the said Island within two years . . . and so hereafter . . . be continually inhabited, dwelt in, and occupied, by forty men at least, our subjects or such as shall oblige themselves by oath . . . that they will be faithful . . . and . . . shall dwell and reside there in . . . the same . . . manner as the inhabitants and our subjects do and are in our . . . Islands of Guernsey and Jersey."[27] At that time, as has been seen in the Isle of Man, the period of farm tenure was a matter not to be taken for granted, and de Carteret was given permission " to lease and farm " parts " for Term . . . of Life, Lives, Years, for ever, or otherwise." He duly settled Sark with forty families, allocating to them holdings round the coasts of the island.

Elizabeth's successor, who was of course accustomed to primogeniture in his ancient kingdom of Scotland as well as in England, ordained in 1612 : " That no Lands or Tenements situate . . . within the said Isle of Sark . . . shall or ought to be partible or parted amongst any Sons, or amongst Sons and Daughters together." He argued that it was necessary, in order to fulfil the intention of the defence of Sark, that the holdings should be kept intact and not burdened by payments to co-heirs. He also argued, in a manner reminiscent of Glanvill's distinction between soccage land anciently divisible and that not anciently divisible[28]: "Because the possessions of the ancient undertenants of the Isles adjacent have been and continue to be partible amongst all the sons and daughters together, though in several portions, the inhabitants of the said Isle of Sark have an affection to that form of descent and would . . . bring their lands so lately purchased to the like descent, which is . . . against law."[29] Their affection for partition among co-heirs was so great that they apparently returned to the practice during the Interregnum, and the Restoration was followed by the reassembling of divided holdings in Sark with a heavy hand. The original forty holdings may not be divided by sale any more than by inheritance and exist to this day, a few only having been added by fresh grants from the seigneur's demesne.

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[26] *Op. cit.* p. 79.

[27] Statement of grant by Queen Elizabeth in 7th year of her reign. Copy among records in the Seigneurie, Sark.

The absence of any protest from Guernsey at the king's arbitrary abrogation of the customary law in part of the bailiwicks may suggest that those engaged in administration there were not so attached to the partition of land as the rank and file of the people. To the island authorities it was the symbolic value of their own law that was all important rather than its contents, and the king's profession not to be introducing a novelty in Sark, but only forbidding what was "against law," without specifying whose law was meant, so to speak saved their face by preventing them from having to recognise that the king had not defended their law but arbitrarily altered it.

In Jersey the ancient near equality among children was valued so little by the states in the early seventeenth century that in 1617 they petitioned the Privy Council to allow the holders of land to entail it, though only up to a certain limited value, and they passed an ordinance to that effect two years later, which was confirmed by Order in Council in 1635. So little advantage was taken of the power of entail that it lapsed through desuetude. As in Sark the population was apparently attached to the old ways.

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[28] *Glanvill*, VII. 3. *Reg.Maj.* II 27: 3 and 5.

[29] Patent of James I in the ninth year of his reign (over England). Copy among records in the Seigneurie, Sark.

The English or Scottish student's sense of equity is likely to be more disturbed by the daughters' share being less than that of the younger sons than by any special privilege of the eldest son, to which he is historically accustomed. To him accordingly it may come as a surprise to find that continental scholars regard Channel Island usage as niggardly to younger sons and generous to daughters, because it gives the eldest so disproportionate a share and gives daughters a small share by right and not only if necessary to promote their marriage.

In the nineteenth century the trend towards primogeniture was checked by statute in both bailiwicks. Guernsey acted first, in the comprehensive *Loi* of 1840, which abolished the right of the brothers to a preliminary twentieth, and required that the preciput of the eldest son should not be made up of choice pieces from different parts of the holding but be confined to a single enclosure. As between sons and daughters, it retained the 2 : 1 division as the norm, but qualified this by the provision that while an individual sister's share should still not exceed a brother's, it should not fall below half a brother's, whatever the numerical make-up of the family. This is still the law in Guernsey, though it, and other matters concerning inheritance such as the extension of the power of bequest, already granted in collateral succession to land, to direct succession, are under consideration at the present time.

Jersey narrowed the claims of the eldest son in 1851 in a different way, by substituting for a tenth part of the area a tenth part of the valuation of the ground. In 1891 the claims of sons (apart from the remaining privilege of the eldest, which was now to five vergées—if in the country—and a tenth of the valuation) and daughters were made equal in that bailiwick except that the sons have the first choice. Moreover, Jersey removed the final limit on freedom of testament of land in 1926, having granted it to the childless in 1891, and to parents in respect of acquêts in 1902.

(3) *Property in Land: Dower and Droit de Viduité.* Both the dower of the widow and the rights of the widower to a life interest in his wife's land are set forth in the *Summa.*[30] Dower is conditional on the marriage being consummated: the declaration "au coucher ensemble gaigne femme son douaire" is often quoted. Except for the special conditions of burgage land (never regarded as of significance in the Islands) it was only claimable according to the *Coutumier* on land held by the husband at the time of the marriage or inherited afterwards from parents or grandparents who had sanctioned the marriage. Alternatively the husband could endow his wife on marriage with specific property which might comprise less than a third of the land but not more. The need for the parents' consent to the marriage to constitute a claim to dower on land descending in the direct line seems early to have lapsed in Jersey, and it was also declared by judgment of the Cour Royale on June 12, 1563, to be claimable there on acquêts made during the marriage (commonly called conquêts). The *Approbation* declares for Guernsey: "On all conquêt made by the husband, and all he inherits in his lifetime, whether by collateral line or otherwise, the wife . . . may take dower." This does not abolish her claim to dower from the estates of her husband's ancestors dying after him if they had agreed to the marriage. By Poingdestre's time, the difference between the Coutume de Normandie and the custom he, writing in Jersey, calls "ours" was not merely that something positive might be added according to the latter. The change might be a diminution: "As the dower

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[30] CII—*De Dote Mulieris* CI. *De Brief de Douaire à Femme*, pp. 246–251.

can increase by the industry of the husband, so it may decrease by his negligence and bad management." *But the widow might choose*; if she renounced her share in her husband's *moveable* succession (see below) she received her dower on the land he held at the time of the marriage, neither more nor less, together with any descending in the direct line either before or after his death.

One striking outward sign of the widow's right of dower may be observed in many farm-houses both in Jersey and in Guernsey, namely the widow's share or annex amounting to about a third of the building.

The Norman *Droit de Viduité* is so like the English and Scottish *Courtesy* as almost certainly to have come from the same origin. The only important difference is that (unlike dower) it lapses on re-marriage. It is conditional on a child having been born alive. The *Summa* does not say that the child must be heard to cry but that, in case of doubt, "enquiry should be made of people of the neighbourhood, whether men or women (so far like the Scottish *Laws of the Four Burghs*) who it is believed on reasonable grounds know the truth."[31] That there is no requirement that the child must be the mother's heir is not surprising among communities where children are co-heirs; moreover this condition seems not to have been primitive either in England or Scotland.[32]

Dower and *Droit de Viduité* are claimable today in both bailiwicks of the Channel Islands.

(4) *The Parts of Moveable Property*. The *Summa* says nothing about claims to moveable property or the limitation of testament therein, no doubt because such matters were not in its time dealt with *in curia laicaili*. That the wife had a claim to her part is shown by several references in the *Très Ancien Coutumier*, a treatise, or rather amalgamation of two treatises, which date from some two generations before the *Summa*, and by accounts of pious benefactions in

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[31] CXXI *De Impeditione Viri Viduati*: CXIX *De Veufveté de Homme*, pp. 301–2.

[32] *Laws of the Four Burghs*, 41. *Glanvill*, VII (18). *Reg.Maj.* II. 58. 6. *Statute Book* (England) Vol. I. p. 78.

monastery records, and the latter occasionally show that when there were children they might have claims; but not often enough to establish the universality of the children's share. In fact it is unlikely that the three-fold division was ever universal either in Normandy or in England; the division was two-fold between man and wife by local usage in a number of districts in Normandy at the end of the sixteenth century, as it seems to have been here and there in England in Lyndwood's day (early fifteenth century) judging from his *Provinciale.*[33]

Nevertheless, it is highly probable that the three-fold division was much the more characteristic of Normandy by the time Glanvill set it forth as the usage of England. A passage in the *Très Ancien Coutumier* has been convincingly edited by Professor Iver of Caen to read: "the chattels of the dead spouse, and of the widow, and of the heir." [34] If this is the true reading, the reason for the singular noun for the third part must, it would seem, be the fact that the eldest received chattels as well as land *for distribution between himself and his co-heirs*, a Norman procedure which may account for the otherwise puzzling ascription by Glanvill also of a third "to the heir." [35] The *Gloss* to a statement in the *Summa* about the confiscation of the goods of suicides and those dying after refusing the last Sacraments says: "their wives and children shall have their part." This seems to be an amplification of a judgment of 1388 reported by Terrien to the effect that, if a husband and father takes his life, his own part of the goods only is forfeit and two thirds belong to his wife and his children. The *Gloss*, however, by going on: "for the husband cannot by his last will dispose so that his wife and his children in his paternal power should not have their part in his moveables," implies that this was already a matter of accepted practice.

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[33] III. 13. 8. quoted by Dowden, *Mediaeval Church in Scotland*, p. 300, Note 3.

[34] *Très Ancien Coutumier de Normandie*, edited E. J. Tardif, Rouen, 1881, V. 5. as rendered in address *Le Partage Tripartite des Meubles* by Professor Iver, delivered and published in Italian in 1938 and 1939, but kindly lent in MS. in French for the purpose of this study.

[35] *Glanvill* VII. 5. *Reg.Maj.* II. 37. 2.

For a full statement however it is necessary to turn to the *Style*. The section on testaments contains the following passage : " A married man who has no children in his paternal power . . . can will a moiety of all his moveables . . . and the other half remains to his wife for her right . . . If the testator is married and has children in his paternal power he can only leave a third part . . . and the two other parts remain, one for his wife and the other for the said children."

When this statement reached Jersey with the officially accepted printed editions of the *Summa* and Guernsey either in the same way or as quoted by Terrien, it introduced no novelty. On the contrary the three-fold division has, to all appearances, always been taken for granted in both bailiwicks.

The words restricting the children's claim to those in the paternal power seem misleading. On the whole, Island jurists and Terrien before them, seem to treat all children as falling under this heading unless they have already received their portion, which in effect was interpreted to mean all except married daughters. By Le Geyt's time, married daughters seem to have shared with the rest in Jersey. In Guernsey their claim depended till 1840 on whether the father had, on their marriage, " reserved " them to a share. According to the *Loi* of that year, the share of married daughters in their father's moveables on his death ceased to depend in Guernsey on reservation and was made conditional on their (optional) return of any tocher to the common stock.

A decision of 1525 on a case in continental Normandy, cited by Terrien, forbade a father benefiting one child more than another from his moveable property. Guernsey accepted this ruling as preventing special legacies to individual children even out of the disposable part. In Jersey, an article [No. 26] was included among the recommendations of a Royal Commission which were accepted as ordinances in 1591, declaring the contrary : " It is permissible to give by last will and testament to whomever it may be, including widow and children . . . that part of moveables . . . which may be left by will." There was however some diversity of Jersey practice in the next century until article 26 was reaffirmed soon after the Restoration.[36] This difference between the bailiwicks endured till restriction on the free disposal of the *portion disponible* was abolished by statute in Guernsey in 1872.[37]

A different complication was introduced in Jersey in the seventeenth century, apparently through the influence of a misinterpretation of a passage in the *Summa* by contemporary Norman jurists, corrected subsequently on the Continent but not in Jersey until it was cleared away by statute in 1851. The unequal division between sons and daughters was carried over from immoveable to moveable property restricting the daughters' share to a third. Her dependence on Terrien protected Guernsey from the risk of this aberration.

It may be also noted here, while considering differences between the bailiwicks, that the Guernsey legislators in 1840 elevated a usage (once apparently characteristic of Jersey also but lapsed there) giving the eldest son certain moveables, such as his father's sword, saddle, and spurs (*cf.* Manx *corbes* but not as in Man given *also* to the eldest daughter) into a definite preciput in moveables, extending to one seventh of the household furniture remaining after the widow has taken her third, besides all family portraits and any plate, etc., presented by public bodies to an ancestor.[38]

The most important difference between the bailiwicks, in its possible primitive origin and lasting effects, is in the claims of the children of widowers and widows. In Guernsey they receive half, like the childless widow.[39] In Jersey they receive two-thirds. Jersey usage seems to agree here with Articles 418 and 423 of the *Coutume Reformée*. The extension of such large claims of the children of widows to those of wives separated *quant aux biens* and now to those of all children to their mothers' separate property under modern law, seems to have stood in the way of the adjustment of legal claims in Jersey to harmonise with the separate moveable property of married women, which has been carried out in Guernsey as in Scotland.[40]

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[36] Le Geyt, *Constitution, Lois, et Usages de Jersey*, IV. pp. 429–437.

[37] See *Note on the Claims of Spouses and Children*: *International and Comparative Law Quarterly*, April, 1953, pp. 275–6.

[38] Peter Jeremie *On the Law of Real Property in Guernsey*, 2nd ed., pp. 38–39.

[39] See also *Glanvill*, VII. 5. *Reg.Maj.* II. 37. 4.

D.—The grounds for the Sixteenth Century denial of Community of Goods: the husband's exclusive power so long as he lived. The famous Article 389 of the *Coutume Réformée* which says "The persons united by marriage do not have goods in common" gives as its grounds, "for wives have nothing until after the husband's death." Terrien had already declared that no distribution of the merged goods took place in the husband's lifetime, and this is taken for granted in both bailiwicks as their usage from time immemorial. If the couple were *séparés quant aux biens*, the wife could leave, not a proportion of the combined property but her own separate goods, and it was these that descended to her children if a wife with separate property died intestate.

To merge the moveable possessions of man and wife and not to accord the wife the right to leave her part by will, or the children or, in the absence of children, the wife's next-of-kin to succeed if she died intestate before her husband, is a procedure embodying a degree of marital power over property by no means taken for granted in most parts of Europe. Continental scholars regard the Norman Coutume, as it became, and the English common law which developed even more drastically in the same direction, dropping legal rights altogether, as granting an altogether exceptional dictatorship to the husband in the sphere of personal property. It is interesting to conjecture how and when this came about.

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[40] See *Note on the Claims of Spouses and Children*: *International and Comparative Law Quarterly*, April, 1953, pp. 276–7.

Under the Roman law and among communities inheriting it, the property of married people was not pooled. Among those with their own customary law it often was, the treatment of the goods (or at least part of the goods) of husband and wife as a unit by some heathen peoples having been elevated on the coming of Christianity into a supposed natural and divine law by the apparently eager assumption that " one estate " followed from " one flesh." The partners in the joint property might be husband and wife only, or husband, wife and children, and the division when this ultimately took place might accordingly be two-fold or three-fold. This community of goods was a matter of popular usage on which the representatives of the Church and the rank and file of Christian people were at one. It seems to have been more wide-spread among the humbler classes than among nobles.

Though no doubt the choice between the two-fold and the three-fold principle and practice varied from district to district, on the whole the latter seems to have been more characteristic of the Normans (though not, so far as Manx evidence goes, of their ancestors the Norsemen) and to have been taken by them to the regions to which they spread. For instance the usage embodied in the laws of the cities of Sicily, as set down in the early thirteenth century, is regarded by scholars as showing Norman influence. The first of the articles in the *Law of Messina*, to which those of some other towns are similar, declares : " All the goods of husband and wife, from whichever side they came, on the birth of a child are united and made one body. And, man and wife wishing (*volentibus viro et uxore*) to divide with the children, a third part of the goods belongs to the father, another to the mother, the remaining third to the child or children." Other articles state that if the children die before the partition, man and wife take half and half, and if it takes place when a parent has already died the children take two thirds, the dead parent's share and their own.[41] This may suggest the principle behind the two-thirds share of the children of widowers and widows in the Norman Coutume of 1583 and in Jersey.

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[41] Quoted by Professor Iver, *Op. cit.*

There is here no marital supremacy. This is *communio bonorum* in what Lord Fraser regarded as its only true sense since man and wife had equal rights.

The French "regions of customary law," however, though they claimed and went on claiming to have community of goods until they eventually bequeathed this to the Code Civile, gave certain rights of administration to the husband, probably through feudal influences, but this only lasted while the couple both lived; the wife had the right to leave her part (usually half) by will, and it descended to her heirs if she died intestate. This continued in spite of occasional statements imbued with the feudal emphasis on marital supremacy over property.

The French community of goods extended to acquired land (acquêts), and, by the time of the *Summa*, the Norman did not, whatever may have been the case earlier. It is, however, difficult to judge how far the admittedly strong declarations in the *Summa* imply that there was already in Normandy a dictatorship of the husband over moveables and an abandonment of *communio bonorum* therein, *such as would postpone all division into parts till the husband's death.* The declaration "man and wife are two in one flesh and their goods should be one" is immediately followed by "which belong to the husband alone,"[42] and in another place it is asserted "Since the wife is in the power of her husband he can do as he will with her and with her goods and with her heritage."[43] This last however (and also a similar statement in *Glanvill*) is weakened by its inclusiveness. The husband could not permanently dispose of his wife's inherited land; her heirs could claim it eventually, and it need not be assumed that their claim on her moveables is necessarily ruled out either. The pleas concerning *mariage encombré*, alluded to in the *Constitution of King John*, were for the recovery after his death of the wife's land alienated by the husband during his lifetime.

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[42] XV *De Monetagio*: *De Monneage*, p. 45.

[43] CI *De Brevi Maritagii Impediti*. C. *De Brief de Mariage Encombré*, p. 240.

Professor Charles Astoul of Caen [44] cites evidence that the exclusive power of the husband was not established by long tradition at the time of the *Summa* and calls attention in particular to a reference in the *Très Ancien Coutumier* [45] to the " common chattels " of the married couple.

The passages in the *Summa* however provided the feudally minded civil powers in Normandy with effective instruments in their set towards the increase of marital authority and the eventual denial in 1583 of *communio bonorum* because " wives have nothing till after the husband's death." The urge to emphasise the difference between Norman and other French usage may have helped the trend. As in England, the Church courts were presumably powerless to prevent this process.

Any rights of the wife therefore were driven to take the form of the permissible separation of goods, and the right to renounce her share of moveable succession *and of debts* on her husband's death, and to hold on instead to her paraphernalia (in the Norman sense of the word) and, in Jersey, to her *mariage en essence* : that is those items of her tocher which were still in being. These alleviations, besides the permanent retention of legal rights on the husband's death, make the Norman and Island position of the wife better than under English common law, but they are rather in the direction of separation than of community of goods. Separation of goods could early be obtained in Normandy, originally to prevent the squandering of the tocher if the husband were impoverished or improvident. The practice was not originated but safeguarded from abuse by the laying down of conditions in Normandy in 1555. In like manner the purpose of a Jersey *Loi sur les Séparations de Biens entre Epoux* of 1878 was to prevent the practice from being taken advantage of to escape from the just claims of creditors.

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[44] Address on *Meubles et Acquêts dans le Régime Matrimonial*, delivered at the *Semaine d'Histoire du Droit Normand* held in Guernsey in 1927 and published in its proceedings.

[45] *Très Ancien Coutumier*, V. 4.

Separation of goods has never affected the wife's claim to a third (or half) part of goods if she becomes a widow. If a wife separated *quant aux biens* died intestate, her goods went (as in Man between 1777 and 1852) to her children if any and otherwise to her husband. She had, however, the same power of bequest as a widow, of the whole of her goods if she were childless, of a third in Jersey, half in Guernsey if she had children, while their *légitime* from their mother's goods was two-thirds in Jersey, half in Guernsey, as it is today from all a married woman's separate moveable property.

In Guernsey, when a couple, or the bride's parents, wished her to have her moveable estate in her own power before the law of 1928, this was done by a *contrat de mariage* entered into before the marriage, and this might give her the right of bequest. In Jersey, however, separation of goods, applied for and ratified after marriage, took the place of marriage contracts or settlements made beforehand.

Accordingly, the condition such separation carried with it of the husband's right to succeed if the wife died intestate and childless was so familiar in Jersey that it was deemed the same was desirable in the case of married women's separate property under modern law. Accordingly a law was passed in 1952—amending that of 1925—declaring that a woman marrying thenceforward " sera censée être séparée de biens d'avec son mari." If she dies childless and intestate accordingly, a woman's separate property under the modern law becomes her husband's in Jersey, whereas if he dies first, intestate and without issue, she gets her legal moiety and the other half goes to his next-of-kin. There is no such inequality in Guernsey, where, if there are no children, the widow or widower equally receives half the moveable estate of the deceased spouse as her or his legal right under the present law, and if the death is intestate the next-of-kin of the dead partner take the rest.

The right of renunciation of the widow's share of goods and debts was established early enough in Normandy to be taken for granted in a case of 1537.[46] It implies a choice by the widow after her husband's death between certain distinct goods and so close a union of material circumstances, both goods and *debts*, that she might, apart from this power of rejection, be left not only without even paraphernalia but with a burden on her *propres*. Le Geyt seems to acknowledge that such a responsibility for debts was a relic of community, and says: " It seems . . . that, according to the ancient usage of the Island, a wife who stipulated for a community of goods could not renounce it after her husband's death." [47]

Paraphernalia in the Islands never had distinct existence in the husband's lifetime, except perhaps as an element in the wife's goods if she had *séparation quant aux biens*, nor could it be claimed by the widow unless she renounced her third (or half) share. It included some domestic furniture as well as clothing, proportionate to the circumstances of the couple, " and however little there be she shall have her bed, her dress, and her chest." [48]

It will be observed that the Norman usage, as it had become both on the Continent and in the Channel Islands, was in contrast with the practice in Scotland, certainly in the sixteenth century and probably earlier, in the absence in Normandy and the Islands of any division on the prior death of the wife, and in the availability of *séparation quant aux biens* and of the power of renunciation of the wife's part and the acceptance, instead and *only* instead, of paraphernalia, defined more inclusively than in either England or Scotland and apportioned by the court. Moreover, the wife's share was usually regarded simply as *succession* which it has never been in Scotland.

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[46] Cited Berault in his commentary on the *Coutume Réformée*.

[47] *Constitution, Lois, et Usages de Jersey* I, p. 227.

[48] *Coutume Réformée* article 395. *Code Le Geyt*, III. 4. 8.

E.—Scotland (*before* 1855) *as displaying a contrasting development from similar roots in a different environment.* The kinship of Scottish to Norman customary law is strongly suggested both by the external evidence of Norman, or Anglo-Norman, immigration and influence from the eleventh to the thirteenth century, and by the internal evidence of its contents in the three-fold division of moveable property, the amounts and, especially in the case of the husband, conditions of the shares of the two spouses in each other's land, and the division of otherwise impartible estates among daughters when there is no son.

That the interaction of Scottish and Norman custom began early, before the time of the *Summa* and probably also before Glanvill and the *Très Ancien Coutumier*, seems to be indicated by the widower's claim to what was later called *courtesy* and its conditions as set forth as the 41st of the *Laws of the Four Burghs*, while the 115th declares the claim of sons and daughters to a third part of moveable property as " the custom of all Scottish towns from time immemorial."[49]

There is no evidence for any assumption in Scotland that the husband's authorisation of the wife's will was needed, until later, and then it is only to be found in the part of the *Regiam Majestatem* which was taken over almost unedited from Glanvill. Moreover, even in Glanvill, the assertion is qualified by the declaration : " it is dutiful and honourable in the husband if he permits his wife to make a reasonable will, that is to say of the part which would be hers if she survived him, which many husbands are wont to do, much to their credit."[50] Balfour's statement in his *Practicks*, referred to in the two earlier articles, though cited by Lord Fraser as of greater authority than the *Regiam Majestatem*, is based directly upon it, and includes this qualification, which Lord Fraser ignores. Scottish wills of married women, however, show no sign of the husband's permission being needed,[51] and in any case he would have had little motive to withhold it, since the Registers of Testaments show that an intestate death of a married woman, as of a man or unmarried woman, meant in Scotland the appointment of an executor dative and the drawing up of a testament dative in which her " deid's part " was reckoned and set forth for the benefit of her children (by any marriage) or other next-of-kin. It may well be this, and not the restriction of the wife's share to a privilege of survival, that represents the earliest Norman custom.

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[49] Though some of the *Leges Quatuor Burgorum* may have been added after the reign of David I (1124–1153), to which they are traditionally ascribed, they are not likely to have been many decades later.

[50] *Glanvill*, VII. 5. *Reg.Maj.* II. 36. 8.

The most likely alternative course of events to the continuous recognition of the claim of the wife and her next-of-kin in the husband's lifetime in Scotland from early times up to the sixteenth century, as from then till 1855, would seem to be its revival or development under the influence of the Church courts in the fourteenth century. That would mean that a contrary process was going on in Scotland to that in England, where the enforcement and preservation of the wife's rights of bequest by the ecclesiastical power were being overruled at that time by contrary decisions in the civil courts.[52]

The Church courts in Scotland had the Holy See behind them in a specially intimate way after the independence of the Scottish from the English province was declared but before there was a Scottish Metropolitan. Points of difficulty were referred direct to Rome, and their judgments do not seem to have been subjected to overruling by the conflicting action of the civil power. On the other hand, in spite of occasional reference in local edicts, neither the two-fold nor the three-fold system of division is part of the universal Canon Law. The Church seems not to have invented but to have recognised and conserved either where she found it in popular practice. Though, on account of the greater size of the country, her courts in Scotland were not so intimate as in Man, they were more in touch with and interested in all Christian people, including the humblest, than the civil courts, and not in the same way inclined to regard property other than land, and property owners other than the landed aristocracy, as relatively unimportant. They were accordingly more qualified than the representatives of the civil power to recognise a custom which was popular rather than aristocratic, as well as more inclined to conserve it.

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[51] In contrast to a single Channel Island (Jersey) will of a married woman, dated 1679, which is stated by the testatrix to be "*authorizée diceluy* (*d'icelui*) *et par son Avis*."

[52] Pollock & Maitland, II, p. 429.

Thus the tentative conclusion would seem to be that in the earliest days both the two-fold and the three-fold division gave the heirs of each partner their share on the death of either and to this extent expressed a true *communio bonorum* ; and that the Church courts conserved this popular usage where, as in Scotland and Man, it was not overwhelmed by the feudal theory enforced by the civil authority of the husband's sole power over the joint moveable property so long as he lived, as happened in England and Normandy. In the Channel Islands, however, this power goes back in history as far as the records take us.

ANNE ASHLEY.

RECENT LEADING SCOTTISH CASES

By David M. Walker, M.A., LL.B., Ph.D., Advocate

SHIPPING—Collision—Limitation of Liability.

An interesting point was decided in the Outer House in *Clifton Steam Trawlers, Ltd.* v. *Duncan Maciver, Ltd.*, 1953 S.L.T. 230. The pursuers were owners of the *Urka* which, by reason of improper navigation, collided with and sank the coal hulk *Portugal*, owned by the defenders, when the latter ship was moored in Stornoway Harbour. There was no loss of life or personal injury and the pursuers brought an action for limitation of their liability to £8 per ton in accordance with the provisions of the Merchant Shipping Acts. The *Portugal* had, however, sunk near the approaches to Stornoway Harbour and the defenders were required by the Harbour Commissioners to take steps to have the wreck removed, which they did through a firm of shipbreakers at a net cost of over £2,400. As the pursuers' liability on the basis of £8 per ton would have amounted to only £1,700 odd, it was apparent that the very material issue was raised whether the cost of removing the wreck was or was not included in the limitation. If the defenders had not had the wreck removed the Harbour Commissioners had statutory powers to do so at the defenders' expense. No question of " actual fault or privity " of the pursuers arose. In these circumstances Lord Sorn held that the pursuers were not entitled to limit their liability in respect of the claim for the cost of removing the wreck of the *Portugal*, but only in respect of the claim for the value of that vessel. The point of statutory construction was whether the removal of the wreck fell under the limitation in respect of " loss or damage caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable " provided in the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, s. 1. Lord Sorn pointed out that the harbour authority might have brought an action at common law against the owners of the *Urka* direct for the cost of removing the wreck of the *Portugal*, in which case their power to limit liability would have been very questionable, depending on the court's taking the view that the

Urka had infringed the harbour authority's "rights," *viz.*, to have its harbour kept unobstructed. But this proposition is too highly stated: see *The Crystal* [1894] A.C. 508. Moreover, in the similar case of *The Millie* [1940] P. 1, Langton J. had held that the owners of a barge which sank in a canal and was raised by the canal authority could not include the cost of salving in their claim for limitation of liability. Accordingly the owners of the *Urka* were liable for the cost of removing the wreck of the *Portugal* over and above their statutorily limited liability. The case emphasises that it is not all cases that come within the beneficent protection of the limitation provisions of these Acts.

JUSTICIARY—Summary procedure—Sentence—Aggravations.

In *McGeachy* v. *Macdonald*, 1953 S.L.T. 236, the High Court of Justiciary was again set a problem on competency of sentences in summary proceedings. Once again the problem arose out of the habits of one who thinks that the Welfare State and in particular the National Assistance Act is a convenient source of funds obtainable without the clumsy necessity of housebreaking or theft. It is abundantly apparent from this case, coming on top of *Maguiness* v. *Macdonald*, 1953 J.C. 31; 1953 S.L.T. 158, that Parliament was seriously at fault in not providing much more drastic penalties for the offence (National Assistance Act, 1948, s. 52 (1)) of making false statements to obtain benefits. This conspicuous lack of foresight allows a fine and/or imprisonment, though the class of individual who may be expected to offend is unlikely to have money to pay a fine, and the provision for liability thereto "on summary conviction" gives the procurator-fiscal no option of indictment. As is well known, the powers of the sheriff on summary conviction are limited to three months' imprisonment, or six months' where the offence is aggravated by at least two previous convictions *ejusdem generis.* McGeachy pleaded guilty to a complaint libelling two contraventions of section 52 (1) of the 1948 Act and the sheriff was shown a schedule of his previous convictions, seven for theft and housebreaking at common law, and one for contravention of the same section 52 (1). The sheriff imposed four months' imprisonment. Clearly this was competent only if two of the previous convictions would count as aggravations. In a bill of suspension the High Court held that the statutory offence was not an " offence inferring dishonest appropriation of property " and thus not *ejusdem generis* with the seven convictions for theft, and hence there was only one conviction, the previous one under section 52 (1), competent to aggravate the offence. In consequence the more severe sentence was incompetent and the sentence had to be reduced to three months', being the maximum competent. The court further observed that previous convictions of common law offences could not be libelled as aggravations of statutory offences of dishonesty. This case further illustrates the cramping effect of the doctrine of *genera* of previous convictions, whereby a criminal with a long record must be treated as a first offender in a matter not *ejusdem generis.* This doctrine goes back to the time of Alison at least (see the history traced in *Wishart* v. *Heatly*, 1949 J.C. 67, 71) and it may well stem from the mistaken view then current that a wrongdoer's mind had separate compartments so that he might be insane *quoad* one matter and sane *quoad ultra.* Alison's reason (i, 304) is that the panel's whole character is not to be made the subject of investigation but only *the parts of it* connected with the crime. In the light of modern psychology and psychiatry this is unsound and impracticable: all crimes are manifestations of some mental maladjustment though certainly in each individual that tends to manifest itself in one form of crime. It accordingly seems that the doctrine of *genera* is antiquated, but as it is recognised by statute, only statute can remove it. Furthermore, it seems that under the influence of this doctrine the court took a narrow view of the phrase " crimes inferring dishonest appropriation of property." Theft and housebreaking are covered by the phrase but apparently, according to this case, not obtaining assistance benefit by falsehood. Lord Keith admitted that this was an offence of dishonesty, but not involving dishonest appropriation of property. Unless monies provided by Parliament are to be accounted other than property (which is possible, but narrow) the sole distinction lies in the " appropriation," so that taking money by theft from the Assistance Board office would be " appropriation " but taking money across the counter in consequence of false statements would not. " Appropriation " is a neutral term and merely denotes " taking possession." This distinction is too narrow to be satisfactory where waste of public funds is involved, which this case and that of *Maguiness* show to be common and quite inadequately punished.

CONSTITUTIONAL LAW—Royal Title—Act of Union, 1707.

The most interesting and important decision recently reported has, of course, been *McCormick* v. *Lord Advocate*, 1953 S.L.T. 255, and it is some years since a case raising such interesting constitutional questions has been before the Scottish courts. In that case two subjects brought a petition for suspension and interdict against the Lord Advocate as representing Her Majesty's Ministers and Officers of State, praying for an interdict against their publishing a Proclamation designating the Queen as " Elizabeth the Second of the United Kingdom of Great Britain." Alternatively, they craved a declaratory order under the Crown Proceedings Act, 1947, s. 21, that the use of the numeral Two was historically unfounded and in contravention of the Treaty of Union of 1707, Art. 1. The Lord Advocate's short answer was that the use of the numeral Two was expressly authorised by the Royal Titles Act, 1953, which, if it did contravene the Treaty of Union, abrogated it, and he also challenged the competency of attacking the royal titles in a court of law. The petitioners sought to justify their petition by averments that publication of the proclamation was likely to cause civil disturbance in Scotland and was injurious to the petitioners as citizens of Scotland. Lord Guthrie in the Outer House dismissed the petition as incompetent on the ground that the Royal Titles Act had authorised the title and numeral and this could not be challenged. It was submitted that Art. 1 of the Treaty of Union was a fundamental condition of the Union and that it was *ultra vires* of Parliament to amend it and pass legislation in contradiction of it, but this argument the Lord Advocate disposed of on the ground that the sovereignty of Parliament was recognised as a basic principle of law. In any event, Lord Guthrie held that the title objected to was not a breach of Art. 1 of the Treaty, and that the petitioners had no title or interest to sue.

In the interval between the debate in the Outer House and the hearing in the Inner House the proclamation had in fact been made without causing overt disturbance and could therefore no longer be prevented. In the Inner House it was contended that the Treaty of Union contained " entrenched clauses " similar to those in the South Africa Act which could not be abrogated and that the assumption of the numeral in the title was contrary thereto. The Inner House dismissed the petition, holding first that the Royal Titles Act, 1953, had no relevance to Her Majesty's assumption of title as this had been adopted at the Accession Council. It merely gave the assent of the United Kingdom Parliament to the adoption by Her Majesty of such changed style and titles as she might think fit having regard to " the said agreement " not part of or scheduled to the Act. The court therefore held that the Act " must remain incapable of being fully understood or intelligently interpreted by any court, the legislature having withheld the material necessary for the purpose." This is a very just but scathing condemnation of our incompetent legislative body. The Lord Advocate thus failed to show statutory authority for the title.

Secondly, the court held that Parliament was not wholly sovereign, at least in respect of certain provisions of the Treaty of Union. The sovereignty of Parliament was probably true of the pre-1707 English Parliament but not of the pre-1707 Scottish Parliament, and why must the post-1707 Parliament of Great Britain be supposed to have inherited the English characteristics? It may be added that this view accords with Holdsworth (H.E.L. X, 527), whose view is that the sovereignty of Parliament only became an accepted theory in the eighteenth century. The main treatment of sovereignty was at the hands of political philosophers and not till Blackstone and Dicey was it analysed in terms of law. The factual answer to the question is, of course, that a predominantly English Parliament, English lawyers and writers and statesmen, have in fact treated Great Britain and the United Kingdom as being England continuing with additional territory, in fact with the acquisition by diplomacy and economic pressure of what Edward I had failed to achieve by the sword, with some sops as to separate church and courts to soothe hurt feelings. As much as anything this attitude proceeded and still proceeds from utter ignorance in England about Scotland and, on discovering a national difference, the amused amazement—" How strange ! " The writer was recently in conversation with an English solicitor and the creation of the Law Society of Scotland was mentioned, whereupon he exclaimed : " Then has The

[English] Law Society lost its rights to admit solicitors in Scotland now?" A member of the English Bar asked the writer whether there were solicitors in Scotland! When told that the Scottish courts did not function in Queen's Bench, Chancery and Probate Divisions he remarked: "How very peculiar." English people take their practice as being standard and every variation as peculiar and abnormal; moreover they do not realise the extent and materiality of the differences between England and Scotland and think that if Scotland is treated the same as Cornwall or Cumberland or other "provinces"—damnable expression—there can be no cause for complaint.

To return, however, to the point: further authority for the concept of a not-entirely-sovereign post-1707 Parliament is found in none less than Dicey, in his *Thoughts on the Scottish Union*, so that this must not be dismissed as a mere figment of Scottish judicial imagination.

The petition, however, truly failed on the third point, that it had not been shown that the Court of Session had authority to entertain the issue whether a governmental act was or was not conform to the Treaty of Union. There was no precedent or authority for this (but on the other hand there was none against it, and on this view the Treaty confers no enforceable rights, and any provision can be scrapped by the action of a legislative body in which the members are not only slaves of one or the other party machine, but the English outnumber the Scots by seven to one).

The Inner House also agreed with the Lord Ordinary that there was nothing in Art. 1 of the Treaty which expressly or impliedly dealt with the royal numerals. In practice they run from William the Conqueror, *i.e.*, the English series has been continued. This is historically entirely unsound and is still objectionable to many people in Scotland. The countries of the Commonwealth also accept it, quite illogically. The matter was doubtless settled for this reign at the Accession Council without much consideration, it being assumed that what suited England would please other countries concerned. In this matter, then, as in the case of appeals to the House of Lords, an unsound and historically unwarranted practice has grown up and is probably past praying for now. As a matter of strict law, the court's view was correct that the matter of the numeral was not mentioned in and was thus not contrary to Art. 1 of the Treaty. Lastly, the court agreed with the Lord Ordinary that the petitioners had failed to show title or interest to sue.

In its political aspects this case voices the considerable volume of Scottish dissatisfaction with the Royal title and many other kindred matters, such as the recrudescence of Tudor emblems and the talk of a New Elizabethan Age, which emphasise the continuity of the English Kingdom and the obliteration of the Scottish instead of recognising the existence of a joint kingdom with ancestry in each country. In its legal aspects the case casts light on the doctrine of parliamentary sovereignty, which is seen to be truly a post-1707 growth, and on the illusory nature of any statutory rights for which enforcement procedure is not available.

RECENT LEADING ENGLISH CASES

By W. A. Elliott, M.C., B.L., Advocate, and of the Inner Temple, Barrister-at-Law

English divorce law is sometimes a dangerous guide in Scotland, where, despite a recent assimilation of statute law, its interpretation in Scotland according to a long history of past precedent has often led to divergent results. But frequently the points to be decided involve questions of common principle and it is thought that the following recent English cases concerning the law of husband and wife may not be only of English interest.

HUSBAND AND WIFE—Divorce—Cruelty—Offending Spouse not Knowing Nature or Quality of His Acts.

Swan v. *Swan* [1953] P. 258 is noteworthy in its refusal to follow *M'Lachlan* v. *M'Lachlan*, 1945 S.C. 382, and the English decision of *Lissack* v. *Lissack* [1951] P. 1. It will be recollected that in *M'Lachlan* the First Division were unanimously of the opinion that decree of separation should be granted to a wife whose husband had been violent and threatening towards her on one occasion while suffering from an epileptic seizure which had rendered him temporarily irresponsible. There were also findings to the effect that similar seizures were likely to occur in the future, and that the pursuer's apprehension of danger to her safety was reasonable. By virtue of section 1 (1) (*c*) of the Divorce (Scotland) Act, 1938, it probably follows that decree of divorce would also be granted in Scotland on the same grounds.

English law, however, is now to the contrary effect. In *Swan* the case turned upon acts of violence committed in August and September, 1949, after which the husband became a voluntary patient in a mental institution. It was proved that during the month in question the husband was suffering from such a defect of reason, from disease of his mind, as not to know the nature or quality of his acts. In these circumstances the Court of Appeal held that he could not have been guilty of cruelty. As Hodson L.J. said: " I can find nothing in the old authorities to justify the proposition that a decree based on cruelty is a remedy given not for a wrong inflicted but solely as a protection for the victim." The emphasis is on the word " solely " because undoubtedly the remedy is not available where the plaintiff does not require protection at the date of the action (see *Dunlop* v. *Dunlop*, 1950 S.C. 227). But it is submitted that in *M'Lachlan* the court were wrong in looking solely to the question of the wife's protection without regard to whether the husband had also been morally guilty of a matrimonial offence. It cannot be in accordance with public opinion that a wife should be allowed to divorce her spouse merely because he has once endangered her unwittingly during an epileptic seizure—and may do so again. Spouses, at any rate, under Scots law were recently declared to be made of sterner stuff than their English counterparts and it seems curious that divorce should be allowed on such a ground only north of the Border. To treat cruelty solely in the light of need for protection is to take it out of the realm of matrimonial offences altogether, which is hardly consistent with the language of the 1938 Act nor with decisions of the consistorial courts which have laid the foundations of the law on this topic.

One of the arguments in favour of granting decree in *M'Lachlan* was that the wife might have been called upon to adhere. But decree of adherence has no practical effect except in regard to aliment. Moreover, as Hodson L.J. pointed out in *Swan*, no effective protection from the violence of an insane spouse is in fact provided by granting decree of divorce. He or she can only be protected in the same way as other members of the public, namely, by incarceration of the guilty partner: " If the insane spouse is not certifiable and cannot be incarcerated, it may well be that it is not only the other spouse who is in need of protection. If the respondent in *M'Lachlan* had been unmarried and looked after by a sister or a nurse the danger would have been the same."

INTERNATIONAL LAW—Husband and Wife—Divorce—Jurisdiction—Comity of Nations.

Travers v. *Holley* [1953] P. 246 raises an interesting point of private international law and should be read alongside the recent Scottish decision of *Warden* v. *Warden*, 1951 S.C. 508. The facts in each case were similar. In *Travers* a husband brought an action of divorce against his wife on the ground of her adultery averring that he had not been domiciled in New South Wales when his wife obtained a pretended decree of divorce there against him in 1944; that she had subsequently gone through a ceremony of marriage with another man with whom she was now cohabiting; and that, as the New South Wales decree was not entitled to recognition in England (owing to lack of jurisdiction) the cohabitation was adulterous. The Court of Appeal (Jenkins L.J. dissenting) held that the husband had acquired a domicile of choice in New South Wales and (*per totam curiam*) even if that domicile had been abandoned by the husband when he afterwards deserted his wife that did not render the subsequent decree against him invalid. By virtue of the New South Wales Matrimonial Causes Act No. 14, 1899, the courts there had jurisdiction if the husband was domiciled in New South Wales at the date of the desertion. The English courts also had a similar jurisdiction under section 13 of the Matrimonial Causes Act, 1937. Accordingly, as the English courts claimed a similar jurisdiction to New South Wales, it would be contrary to principle and inconsistent with international comity if they refused to recognise a jurisdiction which *mutatis mutandis* they claimed for themselves. Even if, while in desertion, the husband had reverted to his English domicile of origin the New South Wales courts were not deprived of jurisdiction. Accordingly the husband was not now entitled to decree of divorce on the ground of his wife's adultery.

On the authority of *Warden*, however, it seems that the Scots courts might have reached a different conclusion albeit that they claim an identical jurisdiction at common law. In *Warden* the facts were similar but the pretended decree was obtained in Nevada where jurisdiction was claimed on the ground of residence. It was argued for the defender that as the Scots courts now had jurisdiction on the grounds of mere residence by virtue of section 2 of the Law Reform (Miscellaneous

Provisions) Act, 1949, they must concede a similar jurisdiction to the American courts. Lord Strachan's subsidiary reason for granting decree was that the defender did not specify any substantial similarity between the Nevada jurisdiction and the conditions embodied in the 1949 Act (and possibly no substantial similarity could in fact have been claimed). His Lordship's main reason, however, for granting decree was a view of the law that is contrary to that as stated in *Travers*. He considered that since the case of *Le Mesurier* [1895] A.C. 517 the general rule was that jurisdiction in divorce belonged only to the courts of the permanent domicile of the husband; and that was still the general rule despite the statutory exceptions imposed by the Matrimonial Causes (War Marriages) Act, 1944, and the 1949 Act. The Court of Appeal, however, has now laid down the principle that where the grounds of jurisdiction are substantially the same each country must recognise the jurisdiction of the other.

MARRIAGE—Invalidity—Absence of Consent—Duress.

In the absence of consent there can be no valid marriage and marriages celebrated *in facie ecclesiae* have been frequently avoided in England and Scotland on the ground of force, fraud or error. But *H.* v. *H.* [1953] 3 W.L.R. 849 appears to be the first case ever reported where the force in question emanated from another source than the respondent, his servants or agents. The facts were that a woman resident in Hungary was anxious to leave her native country owing to fear for her life and liberty. To obtain a foreign passport she went through a ceremony of marriage in 1949 at Budapest and by agreement separated from the other party immediately thereafter. She was able to escape from her native country and in due course presented a petition in England for nullity of her marriage on the ground of duress. No allegation was made against the respondent or his agents. The petition was heard before Karminski J. and was opposed for the Queen's Proctor by the Attorney-General. He argued that in 1949 the petitioner was under no immediate fear and the fact that she only married to acquire a passport was immaterial. In the South African case of *Martens* v. *Martens* [1952] 3 S.A.L.R. 771 a marriage was still held valid despite its primary object being to circumnavigate the Union's immigration laws. The parties had gone through a proper ceremony of marriage and had freely consented to marry albeit for an ulterior improper motive. Karminski J., however, was able to distinguish the present case from *Martens*. He conceded that the petitioner's primary object in getting married was her anxiety to obtain a passport out of Hungary but one had also to inquire why she was so anxious to obtain the passport; this was owing to the fear reasonably entertained by her of the danger which might imperil her if she remained in her native land. And that fear was of such a kind as to negative her consent to the marriage which was accordingly null and void.

No mention was made in this case of the line of Scottish authority dealing with the vitiation of Scots irregular marriages constituted by consent, where such consent was only given for an ulterior or frivolous motive. But it is probable that even in Scotland ulterior motive would not now be held to vitiate a marriage celebrated *in facie ecclesiae* provided there was otherwise a true consent to marry.

DIVORCE—Desertion—Deserted Spouse Obtaining Jewish Bill of Divorcement Prior to Raising Petition.

As the notes on the first two English decisions mentioned in this article seem critical of Scottish authority one may be permitted to end on a note of native preference; for *Joseph* v. *Joseph* [1953] 1 W.L.R. 1182 certainly seems rather hard on the petitioner. A wife whose husband had deserted her in 1936 obtained a bill of divorcement from him in the Court of the Chief Rabbi in London in 1948, which was of no legal effect under English law. Her subsequent petition of divorce in the English courts was dismissed on the ground that although her husband was in desertion of her until 1948, her consent to the bill of divorcement constituted under English law an agreement to live separate from him thus terminating her willingness to adhere and her husband's desertion. For unlike Scots law, English law requires that the *triennium* must immediately precede the raising of the action.

RECENT PRIVY COUNCIL CASES

RENT CONTROL —Alternative accommodation

Hardial Singh and Others v. *Malayan Theatres, Ltd.* ([1953] A.C. 662), an appeal from the High Court of Appeal, Singapore, was concerned with the construction of the Control of Rent Ordinance, No. 25 of 1947, of the Colony of Singapore, and with the circumstances in which it gave protection to a tenant remaining in possession under its provisions after his contractual tenancy had expired. Section 14 (1) of the Ordinance prohibited the recovery of possession of premises let to tenants except in certain specified cases. The terms of the Ordinance applicable to the present case were as follows: "14 (1). No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases . . . (*m*) in any other case where the court considers it reasonable that such an order or judgment be made or given and is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect." The present dispute arose over the application of those provisions to a holding over of business premises.

One branch of the appellants' business consisted of importing Indian films from India which they distributed to film exhibitors. The respondents, who were lessees of the Theatre Royal, North Bridge Road, Singapore, continued in possession after the expiry of their lease as monthly tenants under the Ordinance. In August, 1948, while the respondents were still in possession, the appellants bought the Theatre Royal from the respondents' lessors because they wanted possession so that the first, third and fourth appellants could there exhibit films sent from India by the second appellants. Accordingly, in November, 1948, they served notice to quit on the respondents, terminating the contractual tenancy in December, 1948, and a further notice to quit in respect of the protected tenancy terminating it in May, 1950. The respondents refused to quit, and the present action was brought in October, 1950. The sole dispute now existing between the parties was whether or not it had been established that it would be reasonable to oust the respondents from the premises, and in particular whether or not there was available to the respondents suitable alternative accommodation.

The appellants, who were not in possession of any theatre in Singapore, were obliged to hire halls, at heavy expense, in which to show their films. On an average this amounted to about 50 per cent. of their takings, whereas, if they were able to use the Theatre Royal, they could carry on their business much more profitably and conveniently. On the other hand, the respondents owned some eight or nine theatres in Singapore, and were erecting a fresh one at the naval base, though that appeared to be at a considerable distance from the city itself. Their object, it seemed, was to acquire as many cinema theatres as possible, and, indeed, after the issue of the writ in this case, they acquired a theatre formerly known as the " Shrim " and now christened the " Sun." The trial judge held that the evidence established that there was suitable accommodation for the respondents in one of the other cinemas of which they were in possession, and made an order in favour of the appellants for possession of the Theatre Royal. The Court of Appeal reversed his decision.

The Board stated that the relevant Ordinance contained no limitation of value and extended its protection to all premises, whether used for business or as dwelling-houses, and that very little assistance was to be obtained from cases decided on the terms of the English Acts, since principles applicable to the retention by tenants of places required as a home had very little bearing on the position of a tenant who required a place for his business. Some of the appellants' films had been shown at the Theatre Royal under the auspices of the respondents, and there was evidence that some two or three, at any rate, of the other theatres which were in use by the respondents were suitable for the showing of Indian films. The Board were prepared to assume, without deciding the matter, that such was the case, and indeed were willing to assume that the films now exhibited at the Theatre Royal would be suitable for exhibiting at some at least of the other theatres; but whether they could be shown without interfering with or, indeed, putting an end to the exhibitions which were being carried out at those other theatres, or could be shown at a profit, had never been inquired into or established.

The problem, therefore, resolved itself into the question whether the respondents were obliged so to rearrange their business as to fit the programmes now arranged for and shown at the Theatre Royal into other theatres and, if necessary, close down or alter their performances in those others in order, in that way, to carry on the performances, now taking place at the Theatre Royal, in some one or more of the theatres which were in their possession. The alternative accommodation was required to be available to the tenant, and it was urged that, if he could carry on his type of business adequately elsewhere, it was immaterial that he could not carry on that particular portion of it which was formerly centred on a particular place. That observation, the Board said, had an element of truth, but it must be remembered that the Ordinance was concerned with a dwelling or a business at a particular place. In their opinion the wording used: " No order or judgment for the recovery of possession of any premises comprised in a tenancy," meant that there must be shown to be alternative accommodation for the business carried on in those premises, not simply accommodation for carrying on the business of the statutory tenant in some different and diminished way by some kind of rearrangement in the mode of its conduct. They were not disposed to lay down a general rule that a multiple business could never be so dealt with as to make the closing of one of the multiple shops possible by the provision of alternative space in one of the others. But there must be evidence that the business carried on at the premises about to be surrendered could be suitably accommodated in the remaining premises. It was not enough to make a general statement or express a general finding that, because the tenants had a widespread business conducted at a number of premises, it must be possible for them to carry on by some kind of rearrangement the business for which the tenancy to be surrendered was in use. It must be shown that the business carried on in those premises could be adequately carried on elsewhere. All the circumstances must be taken into account, but after they had all been duly weighed it was still incumbent on the court to find as an independent and essential requisite that suitable alternative accommodation existed, or would exist, when any order or judgment for possession took effect. Unless that requirement was complied with, no court was entitled to make an order, however much it was persuaded that it was reasonable so to do. In the present case, in the Board's opinion, there was no evidence of suitable alternative accommodation, and the appeal was accordingly dismissed.

PROBATE—Whether grant "a final judgment"

J. Lucien Dansereau v. *Colette Berget and Another* ([1953] 3 W.L.R. 676) was an appeal by special leave from a judgment of the Supreme Court of Canada. One of the main issues in the appeal—and the one with which this note is concerned—was whether the judgment of the Court of King's Bench of Quebec, of April 28, 1950, was, in a probate matter, a "final" judgment within the meaning of sections 2 and 36 of the Supreme Court Act, R.S.C. 1927, c. 35, so as to give the Supreme Court jurisdiction to entertain an appeal from the lower court. Section 2 provided: "(*b*) 'Final judgment' means any judgment . . . which determines . . . any substantive right of any of the parties in controversy in any judicial proceeding." By section 36: ". . . an appeal shall lie to the Supreme Court from any judgment of the highest court of final resort . . . in any province of Canada pronounced in a judicial proceeding . . . where such judgment is (*a*) a final judgment."

The Superior Court of Quebec had upheld the probate of the earlier of two wills of a testator. The Court of King's Bench had reversed that judgment and granted probate of the later will. The Supreme Court of Canada, by a majority, dismissed the appeal on the merits, and the minority were of opinion that the appeal should be quashed on the ground that the court was without jurisdiction. The Board stated that it was clear, on the authority of *Migneault* v. *Malo* ((1872) L.R. 4 C.P. 123), that according to the law of Quebec the grant of probate was not, as in England, conclusive, and did not create *res judicata* even between parties who had contested its validity, and therefore that probate could be cancelled on proof of a later will. In those circumstances they were of opinion that the judgment of the Court of King's Bench in the present case was not a final judgment within the meaning of the Supreme Court Act, since the grant of probate was not conclusive and could be contested in appropriate proceedings, and that, if that were so, it could not be said that a grant of probate determined a substantive right in a judicial proceeding within the meaning of the Act. Accordingly, the judgment of the Supreme Court of Canada having been made without jurisdiction, the order of that court should be varied so as to confine it to an order dismissing the appeal for want of jurisdiction; and omitting that part of the order which affirmed the probate of the later will.

MOTOR INSURANCE—Third party—Liability of insurer

Ceylon Motor Insurance Association, Ltd. v. *P. P. Thambugala* ([1953] 3 W.L.R. 486) was an appeal from a judgment and decree of the Supreme Court of Ceylon. The respondent had been injured by a car belonging to one K. Stephen Perera, who had been duly insured against third party risks with the appellant company in accordance with the requirements of the Motor Car Ordinance, No. 45 of 1938. On May 21, 1946, the respondent's proctors wrote the following letter to the appellant company: "We are instructed by [the respondent] to file an action for the recovery of Rs. 15,000 against [the owner of the car] . . . being damages sustained by our client as a result of the above car knocking down our client on September 1, 1945, by reason of the negligent and careless driving on the part of his driver. . . . Unless our client's claim is settled on or before the 31st instant we are instructed to file action against the owner of the car."

In an action against the owner of the car the respondent, on June 25, 1948, obtained a decree against Perera for Rs. 10,000 with legal interest and costs. The amount due on that decree was Rs. 13,881.22 on April 5, 1950, on which date the respondent, availing himself of the provisions of section 133 of the Motor Car Ordinance, brought this action for the recovery of that sum from the appellants. Section 134 stated: "No sum shall be payable by the insurer under the provisions of section 133—(*a*) in respect of any decree, unless before or within seven days after the commencement of the action in which the decree was entered, notice of the action had been given to the insurer by a party to the action." The appellants sought to avoid liability on the ground that notice under the section had not been duly given. The question for decision was whether the letter of May 21, 1946, was a sufficient notice of action under section 134 of the Ordinance. To a large extent the Ordinance followed the English legislation on the subject of the liability of an insurer to a third party.

Section 134 (*a*) bore a resemblance to section 10 (2) (*a*) of the English Road Traffic Act, 1934, which read: " No sum shall be payable by an insurer under the foregoing provisions of this section—(*a*) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had notice of the bringing of the proceedings."

The Board, in referring to *Lewis* v. *Smith* ((1815) Holt N.P. 27 C.P.), said that in that case the Act under consideration incorporated the West India Dock Company, and enacted that no action could be brought against the company unless fourteen days' notice of such action had been given. Gibbs C.J. thought that the letter on which the plaintiff in that case relied as giving notice (which bore in some respects a resemblance to the letter under consideration in the present case) left " it open to conjecture what legal proceedings were in contemplation of the plaintiff, and against whom they were to be brought," and held that the letter was not a proper notice under the Act. In the present case, however, the letter stated that the proceedings were to be for the recovery of damages and that they were to be against the owner of the car, and was consequently free from the defects to which Gibbs C.J. referred.

It had been argued that the letter should have contained the name of the court in which it was proposed to file action. An action could not be specified with precision without reference to its number and to the name of the court in which it was filed. It was to be noticed, however, the Board stated, that section 134 of the Ordinance contemplated something containing less than a precise specification of the action. Though the name of the court could no doubt be given, the section did not require that that should be done—either expressly or by implication. It was further contended that the words " unless our client's claim is settled " reduced the notice to one which was conditional and insufficient for the purposes of section 134. The Board agreed with the Supreme Court that the words must be taken to have meant " settled by you," namely, the appellants. But they were of opinion that, even if they meant " settled by you or someone else " the words did not vitiate the notice. A notice of action without such words necessarily carried with it the implication that action would be filed only if the claim was not settled, and the addition of the express statement did not alter its meaning or effect. The notice set out the name and address of the proposed plaintiff, the name of the owner, and the number, of the car which caused injuries, the date of the accident and the sum which was being claimed from the owner as damages. The Board were of opinion that those elements taken together constituted a sufficient notice of action under section 134, and that there were no elements in it which in any way reduced it to something less than a sufficient notice. The appeal was accordingly dismissed.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, B.A., LL.B., Advocate

NERVOUS SHOCK

It is fairly safe to say that *King* v. *Phillips* ([1953] 1 Q.B. 429) is destined to be the most discussed case of 1953, not only because the question of liability for nervous shock is very controversial but because of the strikingly inconsistent grounds upon which the Lords Justices in the Court of Appeal arrived at the same conclusion. It is just the kind of case to give pleasure to the academic lawyer, as Dr. Goodhart remarks in an article in the *Law Quarterly Review* for July, 1953, for it will enable him to devise a large number of moot problems by a slight alteration in the facts. The issue in the case was whether the mother of a small boy riding a tricycle could recover damages for shock sustained by seeing a taxi back into and strike the boy's tricycle, the mother being at the time at an upstairs window in a house some seventy or eighty yards away in a side street. McNair J. decided against the plaintiff and his judgment was affirmed on appeal by a court consisting of Hodson, Singleton and Denning L.JJ.

It is clear that the facts of the case were very similar to those in *Hambrook* v. *Stokes Bros.* ([1925] 1 K.B. 141), where the mother succeeded in her action, the main difference being that she was in the street, though further away from the scene of the accident, instead of being inside a house overlooking the street. The problem which confronted the Court of Appeal in *King* v. *Phillips* was whether *Hambrook* v. *Stokes Bros.* could be reconciled with the subsequent decision of the House of Lords in *Bourhill* v. *Young* (1942 S.C.(H.L.) 78), the Edinburgh fishwife case. Hodson L.J. thought that in effect *Hambrook* v. *Stokes Bros.* had been overruled by *Bourhill* v. *Young*, and that it was now established that injury by shock was only actionable where the person injured had been put in reasonable fear of immediate danger to himself. Singleton L.J. approved of *Hambrook* v. *Stokes Bros.*, but distinguished it on the ground that the mother was on the highway and therefore within the range of probable danger, physical or emotional, whereas Mrs. King was in a place where the taxi driver could not anticipate she would see his vehicle at all. Denning L.J. also approved of but distinguished *Hambrook* v. *Stokes Bros.* on the different ground that the slow backing of the taxi, in contrast with the terrifying descent of the runaway lorry, could not be expected to cause injury by nervous shock, and so Mrs. King's injury was too remote to be a head of damage.

Dr. Goodhart points out that the facts in *Hambrook* v. *Stokes Bros.* may be considered less strong than in *King* v. *Phillips*, since in the latter case the mother was nearer the accident and had a direct view of it, unlike the mother in the former case. He also remarks pungently that it is not obvious why a mother should receive less of a shock when she sees her child being slowly run over than when it is done rapidly. He maintains, however, that the majority of the Court of Appeal in *King's Case*, though they differed in their grounds for holding that the driver could not have reasonably foreseen the plaintiff's shock, agreed on two important principles: in the first place that the plaintiff in a shock case need not be within the area of potential physical injury to himself, and secondly that the shock need not be based on fear for his own safety. Perhaps Dr. Goodhart is a little optimistic in this contention. It is true that the principles he mentions may be extracted from the opinions of Singleton and Denning L.JJ. But some might say that *King* v. *Phillips* has established nothing except that two members of the court were reluctant to follow *Hambrook* v. *Stokes Bros.* and equally reluctant to disapprove of it, while the other member thought it was bad law.

If *King* v. *Phillips* is hardly a satisfactory decision, it is not unique among shock cases in that respect. *Bourhill* v. *Young* is also unsatisfactory, and the same thing might be said of most of the others. The chief reason is no doubt that judges have not been able to make up their minds to what extent nervous shock ought to be actionable. But it may be that failure to think clearly about terms like " foresight " and " negligence," and to use them only in a consistent manner, has something to do with the chaos of decisions and still more of dicta on the subject. The trouble is not, of course, confined to the question of nervous shock but extends to actions based on negligence in general and in particular where injury or damage has been caused by an accident. Injury in the form of nervous shock, however, is especially liable to lead to confusion owing to the indirect connection between the causative act and the consequent injury.

The problem is to decide whether, let us say, a pedestrian Y is entitled to an award of damages, and if so what damages, as a result of being injured in a traffic accident. Y cannot succeed unless he can show that a particular motorist X has been responsible for the injury and also that he (Y) has suffered particular damage in consequence. Now there are three elements at least to be distinguished: (a) the culpability of X; (b) breach of duty on the part of X towards Y; and (c) determination of damages, if any, due to Y. The three factors must each enter in and be linked together, for Y must show that X has been at fault before any question of X's breach of duty arises and must also show that the damages claimed by him flow from X's breach of duty.

For example, X drives along a street at a speed which is excessive in the circumstances, owing to the amount of traffic in it, etc. X is therefore at fault. But he does not become liable to Y unless in addition he is in breach of a duty towards Y, since " the law takes no cognizance of carelessness in the abstract " (*per* Lord Macmillan in *Donoghue* v. *Stevenson*, 1932 S.C.(H.L.) 31 at p. 70). Thus negligence in the legal sense is a different thing from negligence in the popular sense, for the latter means fault alone while the former requires fault plus injury. It is clear that these two elements are separable. If X passes Y without hurting him, physically or emotionally, X is not in breach of duty towards him, however reckless X's speed and by however close a shave he misses Y. This does not mean that X is not in breach of a duty which he owes to the public generally. But such a breach of duty involves only criminal, not civil liability. There must be injury to a particular person before X is negligent and therefore civilly liable. Assuming, however, that both culpability and injury to Y are present, then the further question arises whether Y can recover damages. This again is a separate element, for Y must show that he has sustained loss as a result of the injury and must prove the particular loss which he claims he has sustained.

Admittedly, it is not easy in practice to keep the different elements involved apart from one another, and indeed in most cases it is only necessary to decide a simple question of liability and, having decided that, to fix the amount of damages payable. On the other hand, where the injury sustained is remote from the fault which caused it, or where the damages claimed are remote from the injury, problems of the greatest difficulty are encountered, which cannot be solved without a precise analysis of the logical steps that lead from ascertainment of fault to measurement of damages. The first step is—

(a) *Fault*. This must depend on foresight. There is hardly room for dispute here, for the only possible test that can be suggested to show whether the motorist, X, was at fault seems to be a consideration of what precautions a reasonably careful driver would have taken if he had been in X's position, having regard to all the circumstances of traffic, visibility, road surface and so on. There is no difference in this respect between civil liability and criminal liability under the Road Traffic Acts. If X has not failed in taking reasonable precautions, that is in foreseeing what an ordinarily careful driver would have foreseen, then no further question arises, and Y's action against him fails at the start. But if fault is established then the next step to be considered is—

(b) *Injury*. In the normal case it follows almost automatically that if X is shown to have been driving carelessly and an accident occurs in which a pedestrian, Y, is injured, then X is liable for Y's injury. But suppose Y is a pregnant woman standing on the street in a safe place, who hears the noise of a collision caused by X's careless driving and receives such a shock that she later has a miscarriage. These are the facts of *Bourhill* v. *Young*. On what principle is it to be decided whether or not X is legally responsible for her injury? The solution of the problem, according to the decision of the House of Lords in *Bourhill's Case*, depends on the answer to the question, could the injury have been reasonably anticipated? If it could X is liable, and if not he escapes liability. This statement, however, conceals an ambiguity which is vitally important. Anticipated by whom? By X, or by " the hypothetical reasonable man," as Lord Wright put it, " viewing the position . . . *ex post facto* "? These alternative propositions are by no means interchangeable.

The first requires that X can, and ought to, foresee (assuming that X is the motor-cyclist in *Bourhill* v. *Young*) not merely that somebody in the vicinity may be injured in some way if he collides with another vehicle, but that a pregnant fishwife, whom he has never heard of and cannot see, because she is standing on the far side of a tramcar, may receive such a shock from the noise of a potential collision that she becomes ill. Surely it is an abuse of language to say that X can reasonably foresee any such eventuality. He might perhaps be said to be capable of *imagining* it, but it is nonsensical to suppose that he, or anybody else, could reasonably *foresee* it. In this and similar cases a man can foresee the general consequences of his carelessness, but cannot possibly foresee the particular consequences which actually ensue. It is, however, the particular consequences which are relevant to determine civil liability. The conclusion may be drawn that liability cannot depend on foresight, unless " foresight " for purposes of fixing liability is used in quite another sense from " foresight " for purposes of deciding a fault. What is said here applies, however, only where there is difficulty in tracing the connection between fault and injury. If the injury can really be foreseen by the person causing it, then liability is no doubt dependent on foresight.

On the other hand, according to the second of the two propositions mentioned above, it is not really a question of *foresight* at all but of *hindsight*. The hypothetical reasonable man, sitting, we may imagine, inside the tramcar and seeing the calamity as a whole—the motor-cyclist coming along at an excessive speed on one side of him, the fishwife displaying signs of pregnancy on the other side, the occurrence of the collision and the reaction of the fishwife to the sudden noise—is not concerned with what the motor-cyclist could reasonably foresee. The question he asks himself, if he is interested in legal conundrums, is whether the shock sustained by the fishwife is the natural result of the motor-cyclist's carelessness or whether it is an abnormal reaction, too remote to sound in damages in a court of law. The same question may indeed conceivably be stated in terms of reasonable anticipation, provided it is not the anticipation of the motor-cyclist, or of any other person in the shoes of the motor-cyclist, which is meant. Could a hypothetical reasonable man, knowing in some miraculous way all the relevant circumstances at the moment the collision occurred, foretell that the fishwife would probably sustain a serious shock? It is submitted that this is the only legitimate sense in which the expression " reasonable anticipation " can be used in *Bourhill* v. *Young*, or for that matter in *Hambrook* v. *Stokes Bros.*, or *King* v. *Phillips*, or the other nervous shock cases.

If the foregoing argument is correct, it appears that " reasonable anticipation," though a justifiable, is an unfortunate test to determine whether there has been a breach of duty. Foresight is relevant to fault, but once fault has been established it is a conception that is of little use. To apply it for a second time involves its employment in a different and artificial sense, which is certainly not conducive to clearness of mind. The alternative test, that is to say, whether the injury was or was not the natural result of the fault in the light of after-knowledge of the surrounding circumstances, is practically the same as the test for remoteness under other systems of law. For example, German law has adopted a doctrine of " adequacy of causation," meaning that the injury must be such as results from the fault according to the normal rules of life without regard to the foresight of the party in fault (see *Manual of German Law*, issued by the Foreign Office, Vol. I, p. 66). Moreover, the test bears at least a close similarity to that recognised in determining remoteness of damages. This brings us to the third of the three elements that are to be distinguished in a logical analysis of the series of events leading from the appearance of X driving his vehicle along a street to Y's recovery of a sum of money from X (or rather his insurance company), namely—

(c) *Damages.* It was established by the *Polemis Case* ([1921] 3 K.B. 560) that assessment of damages depends, not on reasonable anticipation but on whether they are the "direct" result of the negligent act. The word "direct" has caused much trouble and is certainly not satisfactory. Perhaps a reason for choosing it was that "natural" had come to be associated with "probable" and frequently employed in a sense equivalent to "foreseeable." But an occurrence may be natural and probable viewed *ex post facto*, as was that which led to the *Polemis Case*, without being foreseeable. In any event, the word "direct," when used in this connection is hardly distinguishable from "natural" in the sense approximating to "normal." It is an objectionable term because it implies that a scientific test can be discovered by which consequences may be infallibly classified. The less pretentious term "natural" shows better that questions of legal remoteness cannot be answered with scientific precision, that they are in fact essentially jury questions. Whether the problem is one of remoteness of injury from fault, or remoteness of loss from injury, it would be very odd if the same rule were not to be applied. Indeed, although logically it is necessary to bear in mind that two separate problems of remoteness may arise in a reparation case, they are inevitably apt in practice to be lumped together. The judgments in the *Polemis Case* do not distinguish them clearly, and in *Thorogood* v. *Van Den Berghs and Jurgens* ([1951) 1 All E.R. 682) the *Polemis* rule was applied to a pure issue of liability without notice being taken of the different nature of the question.

It has been argued by Dr. Goodhart and others that *Re Polemis* is concerned with remoteness of liability rather than of damages. But this can scarcely be correct. If the fire which destroyed the ship had not occurred there would still have been a possible claim, although perhaps a very small one, for loss sustained owing to the careless dropping of a plank into the hold of the ship. Whereas in *Thorogood's Case* there could have been no claim at all if the plaintiff had not got his hand caught in the revolving blades of a fan carelessly placed on the floor. All the law lords in *Bourhill* v. *Young*, while they expressed different views on the subject of the *Polemis Case*, agreed that the issue there was compensation and not culpability or breach of duty. The facts in the *Polemis Case* were unusual in character, yet the case itself was just the same in type as any case where liability is not in dispute but unexpected loss has resulted. No doubt its notoriety, on the other hand, has arisen from the circumstance that the grounds of the decision may be, as they were in *Thorogood's Case*, applied to the more important issue of remoteness of injury from fault.

The following proposition may perhaps be offered as a statement of the true theory on which by the law of England and of Scotland Y is entitled to compensation as a result of an accident:—Where Y has sustained loss owing to an accident in which X is involved, Y may recover pecuniary damages from X if, and to the extent that, he can show his loss to be attributable to X. Y's loss is attributable to X if the accident was due to X's failure to take the care which a reasonable person in his place would have taken, and if Y's loss was due to the accident. When it is doubtful whether or not the injury to Y arising from the accident was due to failure on X's part to take proper care, X is not liable unless there is a reasonably close causal connection between his fault and Y's injury. It is material, in considering whether the causal connection is sufficiently close, to ask oneself if the injury is the "direct," or the "natural," or the "normal" consequence of X's fault, but no single test or combination of tests is conclusive. The question must be decided on a common-sense view of the facts. The same considerations apply when it is doubtful whether or not Y's loss was due to the injury arising out of the accident.

This theory, assuming it is sound, cannot do more than furnish a general rule, which must be adapted to a particular set of facts in every case, and may be subject to qualifications in certain types of case. Its advantage is that it enables some fallacious reasoning to be avoided, for instance, about the ability of the taxi driver in *King* v. *Phillips* to foresee that Mrs. King might receive a shock through witnessing the accident to her child. He ought no doubt to have foreseen that Master King would be knocked off his tricycle, but unless he was endowed with superhuman faculties he could not have foreseen the effect on Mrs. King.

It is agreed nowadays that injury by way of nervous shock is not too remote a species of injury to exclude liability. The problem is whether in this special kind of case some qualifications are necessary. The division of opinion among the judges of the Court of Appeal in *King* v. *Phillips* illustrates the main question at issue on this topic, namely whether shock caused by fear for the safety of other people, or only by fear for one's self, should be actionable. From the point of view of common sense there does not seem much substance in the distinction, and logically there is no room for it, at least in the theory maintained above. It is as natural and normal a thing for a mother to sustain a shock on seeing a threat to her child's safety as if her own safety were threatened, and the fact that she happens to be in a place where she is out of danger herself when she sees the danger to her child cannot make any difference.

On the other hand, courts have perhaps good reason for being apprehensive of the possibility of false or inflated claims. If an action by a mother frightened for her child is allowed it is scarcely feasible to dismiss an action by another woman who has taken to her bed because she has seen her favourite nephew run over in the street, or even a complete stranger, and between such a case and that of *Bourhill* v. *Young* there is only a thin line. Up to the time of *Owens* v. *Liverpool Corporation* ([1939] 1 K.B. 394) there was a steady tendency to open the door wider, at least in England, for the Court of Session has been more conservative. It is not surprising altogether that since *Bourhill's Case* the tendency has been to shut the door again. Dr. Goodhart is of opinion ("The Shock Cases and Area of Risk" (1953) 16 M.L.R. pp. 14 *et seq.*) that there is no real reason for apprehension, because similar fears expressed when shock was finally established as a cause of action more than fifty years ago have proved to be groundless and courts can be relied on to discriminate between genuine and fabricated claims. But it is possibly unsafe to draw the conclusion that a scarcity of reported decisions means a scarcity of claims. Dealing with the position in Canada, where it appears that liability for nervous shock is not established at all, a learned writer says that " the human animal is adaptable and if such injury were compensable it could be trusted to increase. The courts might never know the extent of this increase, but the insurance adjusters who make over 90 per cent. of the final decisions in motor-vehicle cases would " ((1953) 31 Can.B. Rev. at p. 776).

No one can be sure at present whether the more recent tendency to close the door in shock cases will continue, and there is general agreement that the whole subject is in a state of deplorable uncertainty. Probably a final decision of any sort cannot be expected even if a suitable case reaches the House of Lords in the near future, for the matter is hardly ripe yet. In the existing state of the law it is perhaps correct to say, in spite of the opinions expressed by the majority of the Court of Appeal in *King* v. *Phillips*, that nervous shock is in general only actionable where a person has sustained injury through fear for himself, not for the safety of other people, including his own children. This has the advantage of being a clear rule, which may result in the dismissal of a few meritorious claims but a good many more of an opposite kind. If a line has to be drawn somewhere, it can reasonably be argued that it should be drawn here. At the same time, we may doubt whether it will not seem too strict and arbitrary a rule in the long run. If it proves lasting, the reason will not be that courts like it but that they have been unable to find a satisfactory one to take its place.

SHOULD TESTATORS BE SAVED FROM THEMSELVES?

" It is a cardinal rule, common to English and to Scots law," said the present Lord Chancellor in *Chichester Diocesan Fund* v. *Simpson* ([1944] A.C. 341), " that a man may not delegate his testamentary power. To him the law gives the right to dispose of his estate to ascertained or ascertainable persons. He does not exercise that right if in effect he empowers his executors to say what persons or objects are to be his beneficiaries." Lord Simonds went on to say that there was a single exception to " this salutary rule," namely where there was a general gift to charity. Viscount Simon L.C. and Lord Porter expressed identical opinions. Words to much the same effect were used by law lords in previous cases from *Blair* v. *Duncan* (1901, 4 F.(H.L.) 1) onwards. In spite of these dicta wills are made every day in both countries that give powers of appointment to executors or legatees, by which persons are allowed to make a supplementary will for the testator after his death. It was finally decided in Scotland, as Lord Keith pointed out recently (*Angus's Extrx.* v. *Batchan's Trs.*, 1949 S.C. 335 at p. 370), as long ago as 1828 by *Crichton* v. *Grierson* (3 W. & S. 329), that the fact that a testator had committed to another the power to select individual objects of his bounty from a class sufficiently designated did not render the bequest invalid. In England, on the other hand, as Mr. D. M. Gordon, Q.C., states in an interesting article in the *Law Quarterly Review* for July, 1953, while testators have been conferring powers of appointment by their wills for centuries, the practice was unchallenged until about the beginning of the present century. There is still actually no decision in which a bequest creating powers has been held invalid for delegation *per se*, only for uncertainty, although the dicta referred to above show that there have been judicial qualms arising from the increasing habit of including powers of the widest scope in wills. Probably this is true of Scotland also, since cases like *Sutherland's Trs.* ((1893) 20 R. 925) and *Anderson* v. *Smoke* ((1898) 25 R. 493), where power was given to trustees to dispose of residue " in such manner as they may think proper " or similar terms, appear to have been decided, like parallel English cases, on the ground of uncertainty and not of delegation.

Suppose, suggests Mr. Gordon, A makes a will which simply says: I appoint B my executor and give all my property to such persons as he may appoint. A does not express his own will at all. What he signs is a mere shell, and the real will is made by B after his death. So such a will seems unsustainable; but actually such a will has never been invalidated by the courts; and unless delegation *per se* is a fatal objection there is no principle according to which it could be successfully attacked.

The way in which the rule against delegation of will-making power is reconciled by the courts with recognition of powers of appointment has been explained by Lord Haldane as follows (*Turnbull's Trs.* v. *Lord Advocate*, 1918 S.C.(H.L.) 88): " . . . the testator can defeat the claim of those entitled by law in the absence of a valid will to succeed to the beneficial interest in his estate only if he has made a valid disposition of that beneficial interest. He cannot leave it to another person to make such a disposition for him unless he has passed the beneficial interest to that person to dispose of as his own. He may indeed provide that a special class of persons invested by law with the capacity of persons to hold property are to take in such shares as a third person may determine; but that is only because he has disposed of the beneficial interest in favour of that class as his beneficiaries." Mr. Gordon's criticism of this theory is trenchant. In the first place, there is authority to the effect that a general power of appointment gives no right of property to the holder before he has exercised the power in his own favour. Secondly, a general power does not enable the holder to exercise it in his own favour when he is a trustee. Thirdly, a general power may forbid the holder to appoint to himself, and it has never been suggested that such a power would be better or worse because of that. As for special powers of appointment, a testator's real object in giving such a power is not to benefit a class. It is precisely because he wishes selected members of the class to benefit, instead of all, that he gives the power of appointment. Even if it could be argued that it is a very mild form of discretion to allow another person to choose individuals from a class, this can hardly be said of a power permitting the holder to fix the shares of each appointee, as most powers do.

It may be noted that although Lord Romer in *Muir's Trs.* v. *Williams* (1943 S.C.(H.L.) 47 at p. 58) remarked that there was no difference between English and Scots law as to the nature of general and special powers of appointment, the more usual distinction made in Scotland is a rather different one, namely between proprietary and fiduciary powers (see *Bannerman's Trs.*, 1915 S.C. 398). A proprietary power no doubt corresponds more or less to a general power, and a fiduciary power to a special power. Mr. Gordon's criticism in any event seems to be scarcely affected. If a special, or fiduciary, power implies delegation, then surely *a fortiori* a general or proprietary power does also, unless it can be said that a proprietary power is indistinguishable from ownership. But how can that be, seeing that, for instance, it may be restricted to disposition by *mortis causa* deed? Accordingly, the theory enunciated by Lord Haldane seems to be no more than a legal fiction, which enables two irreconcilable notions to exist side by side.

Mr. Gordon goes on to declare his belief that, though powers have proved their convenience in the past, it is both impossible to justify them in principle and doubtful whether a prohibition of their use in future would involve any serious hardship. He thinks that there are two factors which may conceivably force the hands of the courts by bringing into sharp relief the most vulnerable aspects of the use of powers in wills. First, it is likely that there will be an increase in wills that make no disposition of property at all, but leave the entire disposition to executors. In the second place, the use of special powers may increase to the point of absurdity, owing to the influence of corporations qualified to act as executors. "This practice may very well reach the point where testators must be protected against themselves."

If there is a fault in Mr. Gordon's reasoning, it appears to be that it is too good. He recognises that it would never do if all the powers in wills exercised in the past were now held to be and to have been open to attack, and that it is extremely hard to conceive of the courts' overruling the hosts of cases that have supported powers in wills. But would it not cause something more than a certain amount of inconvenience if Mr. Gordon's views prevailed? The circumstances in which wills are made may render it essential that a large amount of discretion be given to trustees as, for example, a case like *Dundee General Hospitals* v. *Bell's Trs.* (1952 S.C.(H.L.) 78) shows. A power of appointment is only one instance of a discretionary power, and not necessarily the greatest. It would be unfortunate, again, if trustees were debarred from exercising a power conferred on them to encroach on capital for the benefit of a liferenter, which Mr. Gordon denounces as an extreme form of delegation of will-making power, inasmuch as where the estate is otherwise disposed of the effect is to make the disposition defeasible by exercise of the power. If Mr. Gordon had his way the consequence would probably be a substantial increase in the number of intestacies, for persons would be reluctant to make their wills until the last possible moment in case of unforeseen occurrences which their trustees would be powerless to deal with. He may perhaps be right in thinking that the time is coming when testators will have to be protected against themselves. But courts will no doubt be able to protect them by something less than the Procrustean method advocated by Mr. Gordon, even if it requires a sacrifice of theoretical purity and consistency.

Periodicals also received: *The American Journal of International Law, Connecticut Bar Journal, Textes Législatifs Étrangers* (Brussels), *Documentation Juridique Étrangère* (Brussels), *Revista del Foro* (Lima), *Revista Jurídica de la Universidad de Puerto Rico, The Modern Law Review, Revista General de Derecho, Italian Affairs, The International and Comparative Law Quarterly, New York University Law Review, Oklahoma Law Review, Revue Internationale de Droit Comparé, Jus* (Milan), *Jus de Jure Orbis* (Barcelona).

RECENT LITERATURE

Legal Theory. Third Edition. By W. Friedmann, LL.D., DR.JUR., LL.M. 1953. London: Stevens & Sons, Ltd. Price 30s. net.

High praise was deservedly bestowed upon the first two editions of this able work by one of the relativistic school of legal thought. The third edition, rendered necessary partly by new decisions in this country and in the Dominions and the United States, and partly by the advent of new works and new editions, merits equally praiseworthy comments. It is indeed most valuable to have the author's views upon the many developments in the law in the past few years. Dr. Friedmann has taken the opportunity to make a number of important changes in the text. Thus, he has enlarged the chapter on the Natural Law Theories in English and American development. The changes in the attitude of the American courts towards judicial review of legislation receive special treatment and it is most interesting to notice how in a rigid Constitution the scale of legal values, though laid down in formal constitutional documents, can yet be affected by modifications of ideas and the influence of the personalities of the court. Then in a rewritten chapter on the Search for Absolute Ideals of Justice the author illustrates the difficulties created by the problem of resistance to Nazi laws as shown by some of the German post-war cases, and the attempts to reformulate absolute standards of justice—difficulties that had such a distinguished relativist as Dr. Radbruch to put forward a new theory to try to meet the novel situation, though at the end of the day he had to admit that the nullifying of the Hitlerian laws must be left to a higher court or to legislation.

A very important revised section is that on the moulding of the law by precedent and there is also a new section on recent developments in the doctrine of *stare decisis*, the full scope of the recent attack upon which, by the Court of Criminal Appeal in *Rex* v. *Taylor*, has still to be gauged. There is much food for thought and discussion in this all too short section. The Scots lawyer must, of course, read it in conjunction with Professor Smith's work, which Dr. Friedmann cites at p. 356. In an age that has seen and is witnessing so many revolutionary changes in ideas, theories and values the revised chapter on Legal Values in Modern Democracy, in which the section on American and other anti-monopoly legislation has been given fuller treatment, is of special interest and to a wider field than the legal profession.

This third edition is a valuable addition to legal literature. Like its predecessors it is most readable and should be widely read. Every lawyer should have a copy of it.

G. CAMPBELL H. PATON.

Law and Social Change in the U.S.S.R. By John N. Hazard, Professor of Public Law, Columbia University. The London Institute of World Affairs. 1953. London : Stevens & Sons, Ltd. Price 25s. net.

The Soviet legal system is interesting as a subject of study because of both its resemblances to and differences from the systems of non-Communist countries, as well as from the light it sheds on Soviet affairs in general. There have been some striking vicissitudes in legal rules and doctrines since the Revolution. Professor Hazard, who is well known as a leading authority on Soviet law, is primarily concerned in this book with the manner in which law and legal institutions have been manipulated and utilised in order to achieve political aims. That this is so would not be denied by Soviet jurists, for they maintain that law is an instrument of policy and must be flexible enough to adapt itself to changes of political direction. Flexibility, however, extends only to means and has no application to ends. Among the ends which Soviet statesmen have pursued from 1917 none has been of more importance than the elimination of private industry and trade, so far as they involve the employment of labour for private profit. In this case there have been no tactical alterations of course. The aim was substantially achieved long ago, before the new Constitution of 1936 forbade the employment of any labour whatever in privately owned industry. In itself private industry is not illegal. Individual producers or co-operative groups marketing their own wares are allowed to carry on business. But professional traders who buy in order to resell at a profit are banned, the only exception apparently being that boot-blacks may be licensed to purchase and resell accessories for shoes. Speculation is a major crime in the U.S.S.R. and has proved more difficult to abolish than profit-making industry, although there is no possibility of practising it on a large scale. Thus Professor Hazard quotes a case where a man was found in possession of 1,090 pairs of women's stockings and there was evidence that he planned to sell them on the day they were discovered. He was sentenced to five years' imprisonment with loss of electoral rights, and when the sentence was reduced on appeal, the Supreme Court of the U.S.S.R. ordered a new trial on the ground that no cause had been shown for leniency.

On the other hand, private accumulation of wealth is not only permitted but encouraged in the Soviet Union. Saving is favoured by exemption of bank accounts from taxation and from execution in satisfaction of debt, and there has been an increasing tendency to protect private ownership in various ways by force of law. Thus in 1947 the penalties provided for theft and robbery of private goods were raised sharply. With regard to the inheritance of property, Soviet law originally prescribed an upper limit to the value that could be transmitted to heirs or legatees, and also restricted the persons entitled to succeed. As early as 1926, however, the upper limit was removed, and in 1943 the inheritance tax was abolished and replaced by a graduated fee with a maximum of what seems in our eyes the trifling amount of 10 per cent. Seeing that very large variations in earnings exist in the U.S.S.R., it would seem that sooner or later a problem of inequality of wealth is bound to arise. The fact that it is not apparently recognised as a problem at present may be due partly to lack of objects on which owners of wealth can spend it. The Soviet leaders, says Professor Hazard, believe that, so long as they do not allow wealth to take the form of great estates or business empires, there can be no danger to their power, however much cash or consumer goods individuals may possess. In this they may possibly be right, but only if they can be sure that the possessors of great wealth do not use it to obtain power by indirect and devious methods.

It may be, however, that in the future the Soviet attitude towards inequality of wealth will change as drastically as other changes of attitude in the past. Soviet family law affords as good an example as any. Thus in the matter of divorce the greatest laxity prevailed at one time, either husband or wife being free to dissolve the marriage at will, and even without formal notification. But from the year 1935 onwards Soviet policy in regard to divorce and family law in general completely altered, owing primarily perhaps to the evils of juvenile delinquency. The war accentuated the tendency towards increased strictness, and in 1944 a new law was passed to discourage divorce by providing procedural obstacles and high fees. The Soviet courts have made it clear that, although the grounds on which divorce may be obtained are not limited, it is a remedy which is only to be allowed in exceptional cases, where the conditions necessary for the continuance of family life and the rearing of children have ceased to exist. While many capitalist countries, then, have been liberalising their divorce laws, the Soviet Union has gone in the opposite direction. But not so much because of any growth of respect for the sanctity of marriage or of family life in itself, as in consequence of the practical effects of a high rate of divorce on children, and probably also owing to a desire to increase the population of the country for both military and industrial purposes. Accordingly, if those reasons cease to affect Soviet policy, a return is possible to the voluntary conception of marriage which prevailed in the early days of Communism. This opportunist point of view, so different from the deeply rooted and comparatively inflexible prejudices associated with the institution of marriage in other countries, is typical of the unpredictability of Soviet ideas, and no doubt is partly responsible for the difficulty which Russians and non-Russians have in understanding each other.

On the other hand, the stricter attitude to divorce and family law does not stand alone and may represent a reaction towards more realistic and orthodox ways of thinking in the U.S.S.R. The era of sudden reversals of policy may have passed. In many branches of law there is a close parallel between Soviet and capitalist doctrines, and the differences are no more important than between capitalist countries. In the law of tort, for instance, Soviet doctrine, which at first leaned to a theory of liability without fault, now recognises that as a general rule liability depends on fault. The onus, however, lies upon a person causing injury to another to show that he should be relieved of responsibility for repairing the injury, and where an activity is of a specially hazardous nature he can only escape liability on proof of *vis major*, or of intent or gross negligence on the part of the injured person. Of this latter provision Gsovski in his *Soviet Civil Law* (Vol. I, p. 510) says that it is "an interesting and sound attempt to apply in the field of liability for tortious injury the advanced doctrines of European jurisprudence." Professor Hazard remarks that, whereas the law of tort seems to have been thought of originally as a means of redressing the balance between rich and poor, or perhaps of caring for the incapacitated until such time as social insurance funds were adequate to assume the burden, it now serves as an instrument of policy by encouraging State economic administrators to give careful attention to safety rules. But perhaps Professor Hazard's method of approach tends to exaggerate the part played by policy considerations in Soviet law as opposed to the laws of non-Soviet countries. In any system of law policy is the dominant factor, although not always so markedly as in the Soviet Union. Indeed, in the last resort policy in its widest sense and law are hardly distinguishable.

K. W. B. MIDDLETON.

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